THE EVOLUTION OF THE CONTRACTUAL RELATIONSHIP BETWEEN AMERICAN STUDENTS AND THEIR COLLEGES OR UNIVERSITIES

By

ROSA EVANS HALL

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To my parents,
William Staten Bailey and Rubelle Mills Bailey

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By

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The focus of this study was the Western European and colonial American antecedents of the student-university relationship and analyzed the emergence, development, and contemporary status of the contractual relationship between American colleges or universities and their students in light of changing legal and social patterns.

The research procedure of the study was historical-legal. Laws, charters, histories, and documentaries of the 12th through 20th centuries in Western Europe and America were examined to indicate the evolving legal status of students.

Approximately 140 representative student contract cases since 1844 were presented and analyzed.

The study was divided into five periods. First, the emergence and evolution of medieval university customs at Bologna, Paris, and later Oxford and Cambridge and the English common law tradition of in loco parentis were examined.

Next, the following colonial antecedents were addressed: the establishment of sectarian private university education with its adoption of the English residential model and the attendant in loco parentis legal concept; society's widespread endorsement and perpetuation of in loco parentis; opposition to orthodox Calvinist ideology and the rise of secular ideas as reflected in educational practices; the judicial policy of academic abstention; and the creation of the first real state universities.

In the period from 1850 to 1900, the following issues were investigated: the political, economic, and social climate of 1850; the educational environment in the last half of the 19th century; and the evolution of early student demands for redress through contract litigation.

In the period from 1900 to 1950, the influence of the Progressive spirit and the conservative bench on student contract litigation was examined. The Anthony (1928) case was highlighted.

In the final period from 1950 to the present, the following influences on student litigation were examined: rapid social change, the Warren Court's activism, the student movement, and the consumer movement. State and federal case law relating to contemporary student contract issues were analyzed.

In the last phase of this study, the present-day status of the contractual relationship between students and their colleges and universities was reviewed. Possible future developments were noted.

CHAPTER I
INTRODUCTION

The Background of the Study

The American educational experience began with English colonists in an unfamiliar environment attempting to recreate, preserve, and transmit the best of their theocentric European cultural heritage. Confronted with the unexpected hardships of a primitive environment, the early New England settlers made a deliberate effort to establish familiarity by sustaining the "values, institutions, modes of behavior and beliefs of the Old World" (Lucas, 1972, p. 472). These dissenters attempted primarily to reconstruct and improve the 17th-century Reformation society which they had left behind, for they had given up any hope of reforming the Church of England or controlling its crippling influence on Puritan collegiate strongholds under the rule of James I (1603-1625) and Charles I (1625-1649) (Morison, 1935). Under the rule of James I, conscientious Puritans had been unable to finish their university studies because James I had required all graduates to take a loyalty oath to the episcopacy and liturgy of the Church of England. In the subsequent reign of Charles I, university intellectual life had been curtailed even further when any disputes with the Thirty-nine Articles of the

Church of England were forbidden at the university. Furthermore, Archbishop Laud, Chancellor of Oxford after 1626, had initiated his own campaign to purge Oxford of all Puritan dissent (Hofstadter & Metzger, 1955).

The restriction of conscience and restraint of academic freedom which the Puritans found impossible to bear in England ironically did not translate into tolerance and liberty of conscience for all in the New World. The Massachusetts Bay Colony, held with tight reins by Governor John Winthrop, became a "veritable citadel of Puritan orthodoxy, a 'Bible Commonwealth' modeled after Calvin's Geneva" (Lucas, 1972, p. 475). John Calvin, the great Reformation theologian whose influence left an indelible mark on the direction of Puritanism, had espoused the view that "every aspect of life--every act, thought and feeling, whether in the open or behind the blinds bore moral significance and hence lay under ecclesiastic jurisdiction, and everyone within its reach was subject to its control" (Meyer, 1967, p. 20). Hence, the Puritan colony, patterned after Geneva, was a theocracy--a Bible state where church and state were partners, the people were ruled by ecclesiastics, and schools were used as instruments for the advancement of sectarian interests. Naturally, wherever schools were founded, they were created to perpetuate the faith, insure religious conformity, train civic leaders, and train and maintain an orthodox literate clergy.

Since the Puritan community did not welcome liberty of conscience and advocated a conservative Calvinistic standard of moral behavior, one might conclude that the Puritan community viewed university education as threatening. On the contrary, the first generation of Puritan leaders were themselves quite well educated. Within this group, there was one university-trained scholar for every 40 or 50 families. Of the approximately 140 lettered men, 32 had attended Oxford and 100 had attended Cambridge, the stronghold of Puritan thought (Morison, 1935).

These Oxford and Cambridge scholars, who understood that learning provided the solid foundation for cultivating and perpetuating literacy and piety in the rising generation, became the religious and civic backbone of their colony. Just six years after the colonization of the Massachusetts Bay Colony had begun, these lettered men began to advance the cause of education by using John Harvard's estate and library to found Harvard College for the expressed purpose of providing advanced training for future clerical and secular leaders.

Because the founding fathers of the Massachusetts Bay Colony had been educated primarily in English universities, they quite naturally fashioned Harvard College after their familiar models--Cambridge which had been modeled after Oxford and the English dissenting academies (Hofstadter & Metzger, 1955). According to Meyer (1967),

> Harvard began life patterned upon the English model, which is to say, as a college, the lineal descendant of what Robert of Sorbon had humbly begun in thirteenth-century Paris as a hostel to furnish free food and lodging to a small number of empty-pocketed theologues. Four hundred years later the college had transformed into a community of students, living under the same roof with their masters, who besides instructing and policing the collegians, assisted at their meals and prayer. It was, observed Cotton Mather, "the college way of living." (p. 30)

Harvard's early enrollment was small, and tutoring in its sectarian classical curriculum could only be afforded by the aristocratic upper class (Meyer, 1967). According to admissions standards contained in the revised Statutes of Harvard College (1646/1935), prospective students were required "to Read Tully or such like classicall Latin Authour ex tempore, and make and speake true Latin in verse and prose . . . , and decline perfectly the paradigmes of nounes and verbes of the Greeke toungue" (p. 333).

The rules governing behavior, also enumerated in the first code of Harvard laws, were almost duplications of those which was customary at Cambridge and Oxford (Brubacher & Rudy, 1976; Morison, 1935). According to the Statutes of Harvard College (1646/1935), students were to view their primary purpose in life and studies as the pursuit of knowledge of God and Christ and to "study with Reverence and love carefully to reteine God and his truths in their minds" (p. 334). In similar rules included in the preamble to the Statua Reginae

Elizabethae (Elizabethan Statutes) (1570/1852) in effect at Cambridge University when Harvard was established, students had been admonished to "fear God: honor the king: cherish virtue: [and] give attention to the good disciplines" (p. 455).

According to the Statutes of Harvard College (1646/1935), students were not to leave town without permission, nor were they to "frequent the company and society of such men as lead an ungirt and dissolute life" (p. 335). In antecedent Statutes of Queen's College (1341/1921) of which Harvard authorities were aware, Oxford students had been prohibited from spending the night "outside of their own lodging or their farm or in the same suburb except for a necessary and decent reason" unless they disclosed the reason and secured the permission of "the prefect or . . . elder present in the hall" (p. 13). In the Statutes of Queen's College (1341/1921), Oxford students also had been warned to "keep themselves from inns and disgraceful places and from suspected officers so that temptation [might] not proceed from their suspected company" (p. 57).

With regard to other prescriptions for acceptable student behavior, Harvard authorities admonished students "to honor their Magistrates, Elders, tutours, and aged persons" as if they were their parents by remaining silent unless questioned and by using the appropriate expressions of courtesy, honor, and reverence (Statutes of Harvard College, 1646/1935,

p. 334). According to earlier similar Statutes of the Oxford Halls (1483/1936a) which Harvard authorities undoubtedly consulted, students had been reminded that "every member of a hall shall show due honor to his own principal, just as to his elder and his governor" (p. 770). According to Griffiths (1888), who edited a subsequent version of the Oxford laws, the 1636 Laudian Statutes of the University of Oxford, junior and younger students also had been instructed to "show due and suitable reverence to their seniors" and any other elders (p. 146). According to these same statutes, students also had been expected to express appropriate deference "by yielding the preferable place . . . , giving way when those near at hand approach[ed], and by uncovering the head at a suitable distance" (p. 146). Likewise, according to the Statua Reginae Elizabethae (Elizabethan Statutes) (1570/1852), students at Cambridge had been given a similar instruction: "Lower classes shall yield to their superiors in rank and shall honor them with the respect which is their due" (p. 483).

To augment the statutory authority granted in the 1646 code, on October 14, 1646, Harvard's president and fellows were also empowered to use their discretion in punishing any of Harvard's students who were guilty of infractions of college regulations by publicly administrating up to 10 stripes or collecting up to 10 shillings, depending on the severity of the transgression (Parsons, 1899/1971). In short, education at colonial Harvard was much like its English

prototype in that it was intended for a select group of intellectually and socially privileged men whose main enterprise was classical study and daily prayer and who were subject to the discretionary authority of the university inside and outside its residential setting.

The student-university relationship that was established in the original Statutes of William and Mary (1727/1961) and Yale (1745/1961) was not substantially different from the relationship which had been established at prototypic Harvard. Though the subsequent colonial American colleges were open to all denominations, their founders also wished to establish training grounds for divinity cast in the Harvard mold. In the Laws and Orders of Kings College (1755/1961), the Charters of the College of New Jersey (Princeton) (1746,1748/1961), and Charter of the Rhode Island College (Brown) (1769/1961), the founding fathers practically duplicated rules which had been established at Harvard and its Western European antecedents. According to Demarest (1924), the 1766 Statutes of Rutgers, which were lost to posterity, also were similar to those at Harvard and other colonial colleges. Adhering to the student-university relationship established in the Middle Ages at Oxford and Cambridge (Rashdall, 1936b), these college officials placed heavy emphasis on compulsory attendance at all religious services and exercises, on closely supervised dormitories, and on "enforcement of discipline in loco parentis" (Buchter, 1973). Moreover, these early colonial

colleges varied little in their limitless disciplinary discretion, regulation of academic standards, and assessment of student achievement.

College officials continued to exercise traditional in loco parentis authority over students until the middle of the 19th century, at which time some citizens, including a few students, became more independent and began to press for their contractual rights. Officials at American colleges and universities were then forced to relax their untrammeled authority over students. Although all previous students had entered into contracts with universities, no students had chosen to challenge academic officials' interpretations of their contracts until the 19th century. According to Buchter (1973),

> until the early 1900s, the relationship between the student and the institution was expressly stated in a written enrollment contract which was essentially a business agreement between the parent of the student and the institution. Among other things, the agreement provided that the university assume the parental supervisory role over the child. The doctrine of in loco parentis was developed in order to reflect the legal incidents of this relationship. In loco parentis proved to be of limited usefulness as a legal framework in many situations. Thus, courts began to rely on the actual written contract for guidance. When no written contract existed, the courts found it useful to use an implied contract theory to delineate the relationship of the parties. (pp. 253-254)

In addition to the contractual analogy, Kemerer and Deutsch (1979) suggested other theoretical descriptions of the

student-university relationship. According to one theory, higher education was a privilege and not a right. Another theorist proposed that the relationship was analogous to membership in an association. Still another theorist posited that student rights derived from a student's status, not from contract. Alexander and Solomon (1972) discussed two other infrequently used theories: that the university administration held the institution in trust for the students and that the relationship could be analyzed and defined as fiduciary. The court in Dixon v. Alabama State Board of Education (1961) brought the constitutional theory into prominence and essentially brought an end to widespread use of the in loco parentis doctrine. With the emergence of the constitutional theory, the traditional practice of judicial non-intervention in university affairs was modified, and the courts more closely examined student rights.

Since the decline of in loco parentis, courts have primarily relied upon contract theory to provide rights to students beyond those constitutionally or statutorily guaranteed (H. T. Edwards & Nordin, 1979). Moreover, with the passage of time and the gradual changes in social and legal patterns, the courts have continued to analyze and define the relationship between the student and the college or university. While the terms of the contract under the in loco parentis doctrine were historically construed entirely in favor of the university and the courts almost uniformly

practiced academic abstention, the trend has slowly changed such that now

> contract remains the prevailing doctrine of the student-institutional relationship, with certain constitutional protections required if the institution is public. (John, 1977, p. 41)

The decline of _in loco parentis_ and increased reliance on the contractual relationship have generated much debate, several dissertations, and many articles. Brittain (1971) discussed the demise of _in loco parentis_. Buchter (1973) described the contract of enrollment and contrasted it to standard commercial law. Jennings (1980) and Nordin (1981-82) explored the range of the contractual relationship, and De Rowe (1983), El-Khawas (1979), John (1977), Mancusco (1977), and Stark (1976) discussed the consumer aspects of the contractual relationship. However, no researcher has carefully researched the history of the student-university relationship to uncover the historical, social, and legal forces that spawned the contractual relationship as it developed and emerged to the forefront as a current theoretical description of the relationship between American colleges or universities and their students.

The Purpose of the Study

In this study, the researcher examined the western European and colonial American antecedents of the student-university relationship and analyzed the emergence,

development, and contemporary status of the contractual relationship between American colleges or universities and their students in light of changing legal and social patterns.

Importance of the Study

Over the first 300 years of American university history, the student-university relationship had been established through customs and traditions and reinforced through administrative practice. As a result, university officials were granted broad discretion to establish the terms and conditions of the student-university relationship with little or no input from the other party of the contract, the student. Prior to 1960, this unequal balance of power was rarely examined in the courts, and when it was, the courts with few exceptions, adhered to the doctrine of judicial non-intervention or construed the contract in favor of the university. However, over the past 30 years, the courts have been instrumental in helping to shift the balance of power between colleges and universities and their students, providing students with more rights.

Today, the contractual obligations of the college or university often are legitimately questioned or examined in the courts as students continue to assert their rights as significant members of the academic community and to redefine the balance of power. Policymakers in colleges and universities need to understand the evolution of this power

struggle so that they might examine past judicial gains and current legal trends in order to make sound future decisions which will not embroil their institutions in costly and time-consuming litigation or bring about even greater judicial or governmental intervention in the internal affairs of their institutions.

Gustavson (1955) best described the importance of the study of history when he said that

> history enables a person to see himself as part of that living process of human growth which has emerged out of the past and will inexorably project itself out beyond our own lifetime. (pp. 2-3)

Mindful of Gustavson's description, the overall importance of this historical/legal study rests in the fact that the historical overview provided by this project will provide university and college administrators with more information to assist them in identifying and understanding past practices and legal trends which continue to have crucial legal implications with respect to the contractual relationship between the student and the college or university.

Perhaps nothing in history is more certain than change--ideas change; customs change; laws change. With greater information to provide broader perspectives and keener insights into the past, those involved in future academic leadership are more likely to reconsider the past and direct more intelligently a course of change which will eliminate many of the adversarial aspects which currently exist in

contractual relationships between students and their colleges or universities and restore the students' confidence in their college or university leaders' spirit of justice and fair play.

Research Procedures

The researcher utilized information gathered through both the historical and legal approaches. Regarding the overlapping nature of historical and legal research in education, Good and Scates (1954) noted that "the study of legal materials pertaining to educational problems is clearly a type of historical research" (p. 270). With respect to procedures, they noted that "both procedures involve painstaking documentary study of sources, criticism of data, and interpretation" (p. 247).

Historical Research

Ary, Jacobs, and Razavieh (1979) observed that

> historical research is the attempt to establish facts and arrive at conclusions concerning the past. The historian systematically and objectively locates, evaluates, and interprets evidence from which we can learn about the past. Based on the evidence gathered, the historian draws conclusions regarding the past so as to increase our knowledge of how and why past events occurred and the process by which the past became the present. (p. 312)

The authorities on historical research consulted for focus, form, procedures, and general methodology included the

following: Barzun and Graff (1985), Gustavson (1955), and Nevins (1938). Further information about professional scholarship and the selection and evaluation of documents and records was gleaned from Brickman (1973) and Gottschalk (1969).

The data for the historical parts of this project to delineate the antecedents of the relationship between the student and the university were obtained primarily through library research. Sources used to locate materials relevant to historical legal trends and customs in American and European education included the following: Readers Guide to Periodical Literature, Current Index to Journals in Education, Resources in Education, Educational Resources Information Center (ERIC) computerized data base, and Dissertation Abstracts. Other sources of historical data and background information included authoritative works such as The Rise of Universities (Haskins, 1926), The Universities of Europe in the Middle Ages (Rashdall, 1936a, 1936b), The American College and University (Rudolph, 1962), The Emergence of the American University (Veysey, 1965), and Higher Education in Transition (Brubacher & Rudy, 1976). Actual historical documents from the colonial period and documentaries such as American Higher Education: A Documentary History (Hofstadter & Smith, 1961), Documents of American History (Commager, 1963), and The Shaping of American Tradition (Hacker, 1947) were the sources of laws, charters, ordinances, and historical events affecting

education. Such respected historical writings as College Life in the Old South (Coulter, 1928), The Founding of Harvard College (Morison, 1935), and Three Centuries of Harvard (Morison, 1936) provided additional background information.

Legal Research

Standard legal research is similar to historical research in that it requires the researcher to use locators and primary and secondary sources. Significant tools for locating primary and secondary sources for this study included the following: Dissertation Abstracts, ERIC computerized data base, Index to Legal Periodicals, American Digest System, and major legal encyclopedias such as American Jurisprudence, Corpus Juris, and Corpus Juris Secundum. Another helpful means of locating relevant materials was Words and Phrases, an encyclopedia collection which provides definitions, interpretations, and case citations of significance.

An additional research tool used in this project was Shepard's Citations. By consulting Shepard's Citations, the researcher was able to verify the current status of court decisions and locate citations for the cases related to those under investigation. Furthermore, the researcher was able to determine whether the case had been modified, affirmed, reversed, overruled, questioned, cited as precedent or authority in subsequent cases, or limited in some way. Moreover, Shepard's Citations not only contained pertinent

information about the judicial history of a specific case, but also citations of related cases.

The primary sources on which the legal part of this study were based were the actual court decisions themselves. These were found in a variety of reports published by West Publishing Company: Federal Supplement, which contains the opinions of the federal district courts; the Federal Reporter, which includes all cases heard by the federal courts of appeals; the Supreme Court Reporter, which contains the complete text of all decisions made by the U. S. Supreme Court; the published state Reporter for each of the 50 states; and a regional Reporter, which contains state appellate court decisions.

Secondary data were another important source for legal research. They included commentaries, monographs, legal reference books, and articles from law journals and reviews. Regarding the value of these sources, Cohen (1979) stated that

> although these works lack legal authority in the formal sense, some may have a pervasive influence in the law-making process by virtue of the recognized prestige of their authors or the quality of their scholarship. (p. 1)

Two important secondary sources for this study which provided extended analytical commentary on legal issues in post-secondary education were The Journal of College and University Law and The Journal of Law and Education. Articles from such legal periodicals as Harvard Law Review, Yale Law Journal, Suffolk University Law Review, Kentucky Law Journal,

San Diego Law Review, Denver Law Review, and Indiana Law Journal were also excellent sources for commentary, opinions, and analysis of various topics relevant to this study. Other sources of background data and informed opinion for this study included the following: Commentaries on the Laws of England (Blackstone, 1884/1776-1779), Contracts (Corbin, 1952), College and University Law (Alexander & Solomon, 1972), The Law of Higher Education (Kaplin, 1978, 1985), Higher Education and the Law (H. T. Edwards and Nordin, 1979), and The Law and the College Student: Justice in Evolution (Millington, 1979).

Limitations and Delimitations

This study had the following limitations and delimitations:

1. The litigation reported in this study relied on reported court decisions. Cases settled out of court or complaints handled at the institutional level were not reviewed unless they occurred before the 20th century when few breach of contract cases instituted by students ever reached the courts. The reporting of illustrative cases resolved at the institutional level particularly in the colonial period up to 1850 was necessary in order to present a more accurate picture of the evolution of the student-university relationship.

2. Though this study concerned the history of the student-university relationship in both private and public

colleges or universities, there was a shortage of public college or university case law on this topic before mid-20th century because higher education in America was dominated by the private sector until after World War II, and American students before World War I were generally less litigious.

3. Public college or university case law relating to breach of contract was also limited. There were no contract cases litigated involving a public college or university until 1926. However, subsequent to that time, principles of contract law were uniformly applied to both public and private higher education institutions.

4. This study was not a state-by-state analysis of the student-university relationship; it dealt instead with national trends. Nevertheless, state decisions were reported if they were illustrative of patterns typical across the country or indicative of possible future developments. However, decisions at the state lower court level are not controlling in other jurisdictions, and courts in other states may at times view a similar question quite differently.

5. This study did not deal with cases involving elementary and secondary education. Civil rights issues, violations of constitutional due process, or other constitutional rights were not discussed in detail unless they were related to the evolution of contract relations because they had been treated in detail elsewhere by others. Cases involving disciplinary dismissals were not discussed unless

they in some way involved an alleged breach of contract or were illustrative of historical legal analogies used by the courts to characterize the student-university relationship.

Definition of Terms

The following terms are used throughout this study. The primary sources consulted to establish these definitions were Blacks's Law Dictionary (Black, 1968) and the appendix listing legal terminology in Constitutional Rights and Student Life: Value Conflict in Law and Education (Kemerer & Deutsch, 1979). Definitions from other sources are cited separately.

Academic abstention doctrine. This doctrine refers to the tendency of the judiciary to refrain from intervening in university academic matters unless actions taken by institutional agents are arbitrary and capricious (Kaplin, 1978, p. 6).

Appeal. This process refers to the act of resorting to a superior court to review the actions of an inferior court in order to correct mistakes or injustices. The two stages of appeal in federal and most state courts involve appeal from the trial court to an intermediate court and then to the Supreme Court.

Appellant. This term refers to the party who makes an appeal for a review of the case from an inferior (trial) court to a superior (appellate) court because the party lost the case at the inferior court level.

Arbitrary and capricious. Characterization by the court of an action or decision to be irrational, careless, unreasonable, or without adequate determining principle is referred to as arbitrary and capricious.

Breach of contract. Failure, without legal excuse, to carry out any agreements which form all or part of a contract constitutes a breach of said contract.

Case law. This source of law is the body of law aggregated from court decisions as opposed to those developed from statutory or administrative law.

Cause of action. This term refers to fact or facts sufficient enough to support a valid lawsuit.

Common law. The law which continues to develop from court decisions as distinguished from those originating from constitutions, statutes, or administrative agencies is common law.

Contract. A legally enforceable agreement between two or more parties which creates an obligation to perform or not perform some act is a contract. To be an enforceable contract, an agreement must involve the following: competent parties, valid subject matter, legal consideration, mutuality of obligation, and mutuality of agreement.

Contract of adhesion. This kind of contract is "a contract offered by one party (usually the party in the stronger bargaining position) to the other party on a 'take-

it-or-leave-it basis,' with no opportunity to negotiate the terms" (Kaplin, 1978, p. 181).

Contract of enrollment theory. This theory is a theory of student-university relations which views the enrolled student as a party to a matriculation contract with the college or university and,as such,is bound by the terms and obligations agreed upon in this contract.

Contract theory. The theory of student-university relationships based on traditional contract law is referred to as contract theory.

> This theory assumes that the student and the university are parties to a contract, each giving benefits and detriments in order to fulfill the agreement. The school in advertising and seeking students, in effect, makes an offer to the student, and the student by registering accepts. The student agrees to pay tuition and fees and the school agrees to provide instruction and subsequently a degree, if the student remains in good standing academically and abides by the school's rules and regulations. (Alexander and Solomon, 1972, pp. 412-413)

Defendant (appellee). The person against whom relief or recovery is sought, or the accused in a criminal case is called the defendant. In the appellate court, the person who won the lower court case and against whom an appeal is taken is called the appellee.

Fiduciary theory. A theory which represents the relationship between the college or university administrators and trustees and their students as one in which the university, in good faith, acts in a position of trust when

making decisions which affect students' interests is referred to as fiduciary theory.

Guild. A medieval association whose members were involved in kindred pursuits, had common goals and aims, and were organized to promote the welfare of the craft or trade was called a guild. (Renard, 1919)

In loco parentis. This legal term, which literally means in place of the parent, means charged with full responsibility for the discipline, care, and supervision of the child in the absence of the parent.

Plaintiff. The person who initiates a lawsuit against another, alleging he or she has been treated wrongfully is called the plaintiff. In an appellate court, the person who initiates the appeal is called the appellant.

Privilege theory. This term refers to a theory which characterizes the student-university relationship as one in which students are assumed to enjoy special benefits or advantages beyond those available to all citizens. Therefore, higher education is not a right, but a privilege (Alexander and Solomon, 1972).

Stare decisis. Having the literal meaning of

> to stand by decided cases, [this term refers to] a principle of Anglo-American jurisprudence that a precedent once established in a decision of a case should be followed in other like cases unless it is found to be in conflict with established principles of law. (Millington, 1979, p. 600)

Unconscionable contract. This kind of contract is a contract which is so one-sided that one party to the contract essentially has no meaningful choice and the other party benefits from such unreasonably favorable terms that a sensible person would not consider making such a contract, nor would a fair and honest person take such advantage of the other.

Organization of the Study

The remainder of this study is organized in the following way:

Chapter II is an examination of the medieval legal roots of the emerging contractual agreement between students and their colleges or universities, focusing first on the contrast between the model for guilds which originated in Bologna and the model for masters which originated in Paris, and then the development of Oxford and Cambridge as descendants of the Parisian model. In this chapter, the privileges which medieval university students enjoyed under the master-dominated model and the impact the English residential style of college life had on individual student freedom are also discussed. The chapter is concluded by an analysis of the adoption of the English common law concept, in loco parentis, which was the dominant legal analogy used to characterize the college or university's dominion over students at the time American colonization began.

Chapter III is an analysis of the American antecedents of the student-university relationship, beginning with colonial university life at Harvard. The period covered in this chapter extended until 1850, the approximate time at which social and legal forces were converging to bring about the first legislative attempts to draft the Morrill Act, the legislative foundation for contemporary state-supported public university systems. This mid-century point also was the time at which the first breach of contract legislation against the university was initiated by a student. Specifically, Chapter III is an investigation of the establishment of sectarian private university education with its adoption of the English residential model and in loco parentis concept as the dominant American model which shaped academia's paternalistic attitudes first in private and then later in public universities. The legal and social forces operating during this period are discussed in order to illuminate the courts' policy of academic abstention, society's widespread acceptance of in loco parentis, and the government's establishment of the early state universities.

Chapter IV is focused on the rise of the American university and the emergence of the litigious student. The political, social, and economic climate of 1850, the time at which social and legal forces were converging to bring about radical changes in education and attendant changes in the status of students, are discussed at the beginning of the

chapter. The establishment of land-grant colleges and state universities and the emergence of the research universities in the post-Civil War era of rapid industrial transformation also are presented. The effect of educational and social change on the evolution of student demands for change in the in loco parentis practices of authoritarian university officials are then presented. Finally, the emergence of the contractual relationship as a means of addressing student demands for redress in student-university disputes is discussed. Illustrative cases from 1844-1900 which involved breach of contract are described.

Chapter V is a presentation of the influence of the Progressive ideology on society and the state judiciary and the federal judiciary's conservative response to Progressivism in relation to the demands of students for individual rights and the demands of college and university officials for autonomy. Specifically, the U. S. Supreme Court decisions in the period between 1900 and 1937 which had the effect of increasing private enterprise's right to contract without interference from federal or state regulation are presented. These conservative judicial precedents of the Supreme Court are then related to increased judicial support for institutional autonomy at the expense of student rights. Relevant case law relating to the student-university contractual relationship before the court's definitive statement on contract rights in Anthony v. Syracuse (1928) are

discussed and analyzed. Finally, the beginning of the liberalization of the U. S. Supreme Court after 1937 is presented to foreshadow the courts' enlargement of individual rights and abandonment of in loco parentis.

Chapter VI is a presentation of the complete demise of in loco parentis, the rise of the constitutional student-university relationship, and the continued relevance of the contractual student-university relationship as the major source of rights for private college or university students and a secondary source of rights for public college or university students. The social, political, and legal forces which provided the background for current trends in contractual relations between students and modern colleges or universities are presented at the beginning of the chapter. Pertinent cases from 1950 to the present which concerned the student-university relationship and were based on contract doctrine are described. Excepting those wherein due process or other constitutional provisions were violated, analysis of illustrative contract litigation for both public and private colleges or universities which related to the following are presented: dismissals, expulsions, or terminations for academic reasons; unfair grading practices; unfair or unclear admissions policies; unfair tuition policies or increases; failure to provide tuition or fee refunds; deviations from promises, statements, policies, or procedures stated in the catalogue or bulletins; and cancellation or termination of

classes, programs, or scholarships. Breach of contract suits which were the result of dismissals, expulsions, or termination for disciplinary reasons are discussed if they were relative to private colleges or universities, but the constitutional issues which were controlling in dismissals in public colleges or universities are beyond the scope of this study. The ramifications of the passage of the 26th Amendment to the U. S. Constitution and subsequent change in age of majority in some states, along with the trend toward more court intervention in college or university academic affairs, also are discussed in relation to the current contractual status of students.

Chapter VII is a brief presentation of the past and present-day status of contractual relations between students and their colleges or universities with indications of possible emerging developments.

CHAPTER II
THE EMERGENCE AND EVOLUTION OF MEDIEVAL UNIVERSITY CUSTOMS: THE HISTORICAL BASIS FOR LATER LEGAL AND PHILOSOPHICAL PATTERNS

> Laws are instituted when they are promulgated; they are confirmed when they are approved by the customs of the users. For even as some laws are today abrogated by the contrary customs of the users, so by the customs of the users, laws are confirmed.
>
> (Gratian, 1148, Pt. I, Distinction IV)

The history of the contractual relationship between the student and the American college or university began in the Western European medieval universities where the relationship was originated, reinforced, and institutionalized in form, tradition, and law by its lineal descendants, Oxford, Cambridge, and the colonial colleges. Therefore, in this chapter the following concerns are addressed: the emergence of the university's archetypes, the guilds at Bologna and Paris, the adoption by the English of the magisterial guild with its firmly established and subsequently increased tradition of scholarly privileges, and the development and adoption of the _in loco parentis_ common law doctrine which emerged as the dominant legal concept used to characterize the English student-university relationship.

The Bologna Archetype

According to Rashdall (1936), the earliest universities at both Bologna and Paris were well established by the end of the 12th century, as was Oxford, which had been modeled after Paris. Though the two parent universities were established about the same time, they were quite distinct with respect to their focus of study and the role played by the students. Bologna supplied the medieval model for student guilds and became a center for the study of civil and, later, canon law, while Paris was, from its inception, a masters' guild enjoying a reputation as an arts center for dialectical and theological study.

Bologna, the model for guilds dominated by students, "was in origin a lay creation designed for the career interests of laymen studying Roman law" (Cobban, 1975, p. 48). Rashdall (1936a) described the students who traveled from throughout Europe to study law at Bologna as older, wealthier, more mature, and more highly positioned socially than those who gathered at the University of Paris. "Medieval student power," as Cobban (1975) described it, did not emerge as the dominant prototype at Bologna because these students ideologically felt a drastic need for change away from the master-dominated system found in the old monastery and cathedral schools of the early medieval period. Rather, the Bolognese students associated themselves into guilds or

universitates for some degree of protection against potential enemies present in the social and political context.

In the self-governing Italian cities of the 12th century, all citizens enjoyed civil rights, which included personal protection and the safeguarding of property. These civil rights were not extended to any citizens who were not born within the city; hence, all foreign students who came to Bologna were vulnerable because they had no legal rights. Furthermore, according to Rashdall (1936a), one law existed for citizens of the Bolognese commune, while a much harsher one was meted out to aliens.

Over the course of the 12th century, many of the Bolognese citizens, craftsmen, and merchants who had originally grouped themselves into guilds for collective protection had gained legal recognition and increased constitutional position, and, as such, wielded power within the commune almost equal to and practically independent of the city magistrates' control (Ferguson and Brunn, 1969). In the latter half of the century, while the members of these fractious political factions continued to battle for power within the commune, Frederick I was attempting to recover imperial control of Italy from without. Against this backdrop of political turbulence, the law students felt compelled to create for themselves a guild for mutual safety and protection of property. Moreover, they were aliens with the normal needs of students for recreation, mutual support,

and religious affiliation, who at the same time felt vulnerable in the face of Bologna's unsympathetic city law, the equally formidable intact guilds, and Frederick's attempts to subdue the defiance of the united front presented by the papacy and the Lombard cities. According to Cobban (1975), "it was from the protective organization called into being by the law students that there evolved a whole parade of student controls which is the especial distinguished feature of Europe's first university" (p. 55).

Originally, the law scholars had gathered at Bologna to be taught by such outstanding law doctors as Irnerius, the civil law jurist, and Gratian, the canon law jurist. The masters, who received no fixed stipends, were rivals for students, but as respected experts, they maintained their customary dominant position over students, for early law students had no organized guilds. The relationship between the student and the master was based on a contract between the master and his pupils (Cobban, 1975; Koeppler, 1939).

The members of the various guilds, universitas scholarium, according to Cobban (1975), exercised the right to select, evaluate, supervise, and discipline the teaching masters whom they viewed essentially as respected academic consultants who were paid by the guilds for their expertise, but who were granted no power. According to Rashdall (1936a), the power of the student guilds to regulate the behavior of its members as well as to determine its

relationship with outside forces was supported by the Roman law. Extant Roman legal concepts held that the members of any group or profession had the intrinsic right to organize, elect leaders, and voluntarily construct self-governing statutes which were enforced through the swearing of an oath of obedience which mandated the undivided allegiance of its members. Regarding the power of this oath, Rashdall (1936a) stated that

> moreover, while the legal authority of modern clubs and societies over their members is based for the most part upon a mere contract, in the Middle Ages it was based on oath. And in the Middle Ages an oath meant a great deal more than it does in modern communities. Perjury was mortal sin; and the oaths of obedience consequently enabled the guilds to subject disobedient members not only to public 'infamy' and to spiritual penalties at the hands of their confessors but even to proceedings in salutem animae in the ecclesiastical courts. The combined force of the social and spiritual penalties thus wielded by the guild was so enormous that in the Italian cities they often become more powerful than the state. (pp. 153-155)

Hence, the members of the legalistic student guilds used the economic power of boycott to subject offensive professors, the economic threat of the guilds' migration to subject the city magistrates, and the power of oath to subject errant students who supported boycotted professors or resisted the authority of the consensually mandated statutes of the guild.

Further support for the legal and constitutional authority of the student universities or guilds derived from

three additional sources: Frederick I (Koeppler, 1939; Ullmann, 1953/1978), the papacy (Kibre, 1962; Rashdall, 1936), and the Bolognese commune itself (Cobban, 1975; Kibre, 1962). Emperor Frederick I at the Diet of Roncaglia in November 1158, issued a constitution to address serious political disputes between himself and the kingdom of Lombardy concerning the threat to imperial authority posed by the Lombardy cities, of which Bologna was one. Frederick sought the advice of the prominent Bologna law doctors for help in framing a constitution because their knowledge of Roman law was necessary to advance his political mission, namely to use Roman law as an ideological basis for strengthening the central authority of his empire (Post, 1964) and to effectively counterbalance both the upsurge of interest in canon law studies and "the rising tide of papalism" (Ullmann, 1953/1978, p. 108). While the council was taking place, Frederick also promulgated the Authentica Habita. This historic document granted imperial privileges to Roman civil law scholars similar to the special privileges and immunities which had been granted to rhetoric and grammar scholars by the Roman law of previous centuries in the Corpus iuris civilis. These scholarly privileges granted by Frederick were also similar to the special clerical privileges granted by the papacy to clerical scholars of the Middle Ages in the form of privilegium clericorium and later recorded in Gratian's Decretum, a compilation of canon law

similar to Justinian's compilation of civil law. The Authentica Habita was to serve as the legal precedent for future claims by the universities at Paris and Oxford for privilegia scholarium. Moreover, according to Powicke (1949), in spite of the original intent, later scholars were to use the Authentica Habita as a signal that secular power was the source of academic privileges.

Originally, Frederick's grant of special privileges in the Authentica Habita had provided special imperial protection for students traveling to or residing in academic centers in his kingdom for the specific purpose of studying Roman civil law. This particular group of scholars was deemed worthy of imperial privilege, according to the Authentica Habita (1158/1939), because Frederick declared "the whole world is illuminated by their learning, [leading] to obedience of God and us" (p. 607). Another privilege granted by Frederick in the Authentica Habita exempted students from the exercise of reprisals, a medieval practice by which an aggrieved private citizen could hold a community, or in this instance a guild, collectively liable for the debts of any of the group's members and vice versa (Koeppler, 1939). The Authentica Habita contained provisions that any citizen who failed to punish the perpetrator would suffer severe penalties. In the final privilege, students were given the right to reject the judicial authority of the city magistrates and elect to have their cases as plaintiffs or

defendants heard before their own law masters or the bishop. While this privilege was originally equally applicable in civil and criminal cases, it later was applied only to civil cases. Criminal cases, according to Rashdall (1936a), were placed under the jurisdiction of the city.

While the original Authentica Habita applied only to Roman law students, subsequent medieval jurists interpreted it such that its authority was extended to protect all lay students and their households, servants, bookbinders, scribes, and members of other trades who served the university community. Moreover, according to Cobban (1975), the privilege of choice of judicial jurisdiction granted by Frederick in 1158

> developed an ecumenical application and became a basis for the rights of jurisdiction claimed by the university authorities over their students throughout the medieval period. In the course of time, the powers of the bishop in the affairs of the universities were whittled away, and episcopal jurisdiction devolved upon the university courts, which became the normal tribunals for academic cases. (p. 55)

The papacy also helped to legitimize the student university's authority by lending its support in the form of various papal bulls which at times helped to ease strained relations between the Bolognese commune and the student-controlled universities or guilds. According to Cobban (1975), Kibre (1962), and Rashdall (1936a), such was the case in 1252 and 1253 when the statutes of the student

universities were confirmed by both the city and the papacy, and violators were subjected to ecclesiastic censure following a confused period in which the city authorities had forced the student rectors to take oaths against secession but which had not prohibited persistent student migrations to other locations. Furthermore, in accordance with early interpreters of the Authentica Habita, certain imperial privileges related to travel were contingent onthe emperor's or pope's recognition of the student's destination as a studium generale before students could claim exemption for tolls or customs (Ullmann, 1953/1978). Hence, papal recognition of these centers of learning was necessary to insure the receipt of full benefits for the lay students comparable to those of clerical students.

Pope Honorius III further legitimized the Bologna universities in 1219 when he instituted papal authority over the right to grant teaching licenses. In this papal bull, (1219/1936a), Honorius III, former Archdeacon of Bologna, decreed that the current Archdeacon of Bologna, Gratia, was designated to confer all teaching licenses so that only candidates who had been thoroughly examined by the archdeacon could be permitted to teach in the universities of Bologna. According to Rashdall (1936a), after this papal pronouncement, "graduation ceased to imply the mere admission into a private society of teachers, and bestowed a definite legal status in the eyes of church and State alike" (p. 222).

In spite of the aforementioned conflicts concerning secession, the city of Bologna was, for the most part, supportive of the student university. Though town and gown disputes erupted from time to time throughout the 13th and 14th centuries, in keeping with medieval interpretations of Roman law, the city recognized the following rights: the intrinsic right of the students to voluntarily organize into guilds, the right to voluntarily enact statutes that were binding through oaths, and the right to elect as their leader a rector whose legal jurisdiction over his members was unquestioned (Rashdall, 1936a). They further recognized the economic advantages presented by the presence of the student guilds, and any conflicts which occurred did not result from questions concerning the legal or constitutional basis of the university, but from conflicts over the threat posed by the rector's authority to order a migration.

Though the Authentica Habita, the papacy, and the commune all provided support for the student university, and the Bolognese law students were more mature, more motivated, and more politically and legally astute than their northern counterparts in the Parisian universities of masters, the attempts by the southern universities to establish student university administration as the permanent alternative to magisterial university government ultimately failed. The extremely rigid controls which the students with their contractual view of university life imposed on the masters

became increasingly more threatening to the same social and political forces which had originally provided them legitimacy or lent them support. According to Cobban (1975), the autonomous student university was regarded by its contemporaries as "an anomaly contrary to natural order" (p. 188); hence, as far as practical politics was concerned, "student power" in its unadulterated form held little potential for longevity. There was little resistance to its ultimate demise because, as Cobban (1975) observed, "it offered too much violence to the professional sensibilities of university teachers, and was a constant jurisdictional challenge to state authority" (p. 189).

Though the student was permitted to hold the dominant power position at Bologna and Padua, this kind of student-university relationship was not the case at all the Italian universities. Some universities had much more modest forms of student participation; however, even these forms were phased out by the 14th and 15th centuries. The economic control which the students had held over the masters through the threat of boycott and migration had been broken when the members of the commune had established salaried lectureships in the last quarter of the 13th century. With the balance of power between students and masters no longer contingent on the money relationship, the distribution of power began to shift. By the end of the 14th century, the members of the commune had almost completely wrestled control of university

affairs away from the students. Kibre (1962) asserts that by the 15th century, the teaching masters had secured control of all significant issues related to academic affairs. Elaborating on this situation at the end of the 15th century, Cobban (1975) concluded that

> the universities, overwhelmingly orientated towards the professional needs of society became increasingly reflective of the establishment which they served. The unsettling nature of student power, with its weapons of boycott and migration, posed too great a threat to the more ordered, sedentary character that the universities were acquiring in the fourteenth and fifteenth centuries. Societies expected an adequate return for their investments in the form of buildings and so forth. That return was deemed to be put in jeopardy by the machinations of student politics. (pp. 194-195)

The Paris Archetype

While the formation of scholastic guilds in Bologna was a natural outgrowth of the social and political conditions of the late 12th century, the distribution of power in these student guilds was quite a departure from regular medieval guilds practices. The University of Paris, however, was modeled after the established guild model which had three steps for being a guildsman: apprentice, journeyman, and master. In the apprenticeship stages, according to Renard (1919), the parents contracted with a master and, in most cases, paid this experienced master a fee to take their pre-adolescent child into his home to train him. From then on,

the child was subject to the *in loco parentis* authority and tutelage of the master. After several years of thorough training, the apprentice became a journeyman who could work and receive some salary as he continued to study under the watchful eye of the guild. Then, according to Coulton (1939), after a predetermined number of years of proven performance, traditionally averaging about 7, the journeyman was deemed eligible to produce public evidence of his expertise, his masterpiece, and if he could pass this final examination, he became a master himself. At this time, he received in a special ceremony the tools and vestments symbolic of the commencement of his role as master within the guild. In keeping with this tradition, the Parisian masters associated themselves in protective guilds, and the undergraduates who were apprenticed by their parents to these guilds were subject to the terms of their discipline, "parental" regulation, and general supervision.

The academic guilds followed the trade guild models. The academic guilds established and regulated the course of study and the terms of qualification for intermediate advancement to journeyman, through the baccalaureate degree, and final recognition as a master, through continued study, thorough examination, and ceremonial inception.

Unlike other contemporary guilds which were legally constituted autonomous corporations free from external authority, the Parisian academic guilds, however, did not

have the final authority to grant teaching licenses without which no journeyman could legitimately become a teaching master. The authority to grant licenses to all qualified applicants, according to Rashdall (1936a), had been vested by the Third Lateran Council of 1179 in the Chancellor of Notre Dame who acted as the delegate of the bishop of Paris. This papal legislation had not been intended to interfere with university autonomy, but was to insure the integrity of the teaching license and prevent the lucrative monopolies of some chancellors who made licensure conditional on oaths of allegiance or contingent on payment of some fee. While the sanction, favor, protection, and stability offered to the masters by the Parisian ecclesiastic authorities likely led to the stability of the masters' guilds initially, this same ecclesiastic domination later became the source of much struggle and conflict between the masters' guild and the Parisian church executives.

Support for the university at Paris was similar to the imperial and ecclesiastic support enjoyed by its Bolognese counterpart. Location of a university in its midst was perceived as beneficial by the Capetian monarchy because a large number of cosmopolitan students and masters helped to promote the economic, social, and political development of Paris and established France as a center of academic activity (Cobban, 1975). In addition to imperial support, the students and masters were well served by the ecclesiastic

authorities who originally granted them favor and protection through clerical status with its attendant clerical privileges and later confirmed these favors in a series of subsequent papal bulls. Among these clerical privileges, Rashdall (1936a) reported that jurisdiction in secular cases which involved the masters and students was taken out of the hands of Parisian magistrates and placed in ecclesiastic courts by the Bull of Celestine III in 1194. Imperial endorsement of the clerical privileges for scholars granted by Pope Celestine in 1194 came after a town and gown struggle in 1200. At this time King Philip Augustus gave the university a charter of liberties which provided that royal officers, according to sworn oaths, were bound to turn over cases of any university scholars and masters to ecclesiastic judges for consideration and discipline (Kibre, 1954).

In spite of extensive royal and ecclesiastic support, town and gown clashes continued to occur until the university masters, outraged, ceased lectures and migrated from Paris in 1229 to protest the execution of a scholar by Parisian magisterial authorities and to force recognition of the university's rights and privileges as a guild and as scholars. To end this controversy and to induce the scholars to return to Paris, in 1231 Pope Gregory IX mandated a settlement, the Parens Scientiarum, in which he defined the rights of the university to legislate its own affairs and curbed the authority of the chancellor to circumscribe the

university's authority. King Louis IX also intervened on the scholars' behalf and reaffirmed the previous charter granted in 1210 by Philip Augustus. Though these interventions did not end resistance to the guilds' rights nor resentment between the town provost and the scholars, Kibre (1954) contended that in all future conflicts until the 15th century, the members of the Parisian university enjoyed successive imperial support in the form of expanded privileges, grants, and concessions. To some extent, this increased imperial protection and favor was due to the economic benefits of the studium's presence, as well as declining papal support and commentators' expansions and interpretations of Frederick's Authentica Habita.

Coeval with the support of imperial and papal privileges and rights in the 13th century was the gradual move towards university autonomy. While originally the ecclesiastic authorities judged and licensed scholars, later struggles with the papacy and the bolstering support of the French monarchy resulted in a contraction of the powers of the bishop and the chancellor in university affairs. Gradually, the rector of the university became its executive head, and the university became autonomous with respect to legal jurisdiction over its members. By the early 13th century, the Parisian guild of masters had successfully implemented the provisions of the Code of Statutes granted in 1215 by Robert de Courcon, the legate of Pope Innocent III. This

code had authorized the Parisian university authorities to devise its own statutes concerning its members and to enforce them through oaths and penalties, provided the guild did not dismantle or move to another location (Cobban, 1975; Post, 1964; Rashdall, 1936a).

By the middle of the 13th century, the Parisian university had full corporate standing (Post, 1964). The members of the university faculty of arts had divided into four autonomous nations, each exercising the guild's corporate right of "having its own elected officers and proctor as its head, statutes, and archives, finances, seal, schools, assembly points, and feast days" (Cobban, 1975, p. 87). These nations had elected a common head called a rector. As the real head of the university, the rector, and not its nominal head, the Chancellor of Notre Dame, had been charged with executive responsibilities: summoning and presiding over university congregations, announcing the collective decisions of the nations, and representing the university as its chief officer in external affairs. Furthermore, the rector, along with the proctors of each nation, served as the tribunal in cases concerning members of the nations with external parties or in cases involving violations of university decrees.

During the late 13th century and continuing into the 14th century, the members of the Parisian university continued to enjoy scholarly privileges. However, serious divisive

struggles with the pope and the Chancellor of Notre Dame over the university's desire for autonomy and the refusal of the mendicant clerical orders to submit to the magisterial guilds' oath of obedience while exercising all the privileges of its legitimate members led to a polarization of positions. As relations with ecclesiastic authorities worsened, the members of the university gradually increased its dependence on imperial support. Kibre (1962) reported that the scholars' mounting abuses and violations of scholarly privileges and immunities, which went unpunished in the studium's court in the 14th and 15th centuries, along with the scholars' participation in the political turmoil and civil strife of the 14th century, continued to create sustained agitation and dissention between the university and the French populace as well.

By the 15th century, the monarchy had begun an effort to centralize its authority and, in so doing, launched an effort to nationalize the university by subjecting it to the authority of the Parlement of Paris (Kibre, 1962). Moreover, as a result of actions taken by the monarchy, by the end of the 15th century, the autonomy of the university essentially had been lost. Through legislation, the critical right to cessation of lectures and migration, a right originally conferred by papal bull in the Parens Scientiarum, no longer existed. Even though university scholars continued to have privileges and immunities through royal indulgence, the

scholars at University of Paris were no longer perceived as having any inherent rights.

Consistent with the corporate character of medieval guilds and the position of apprentices within those corporate associations, even at the height of the university's exercise of autonomy, students in the magisterial guilds enjoyed some associational benefits, but little, if any, power. Kibre (1948) noted that students who had not earned the rank of master of arts were loosely considered a part of the guild by virtue of their association with and apprenticeship to a master; however, they were not allowed to vote or participate in group discussions or decisions of the arts faculties or nations. According to Post (1964), "a corporation of any importance could control its membership by establishing rules and regulations with which the apprentices or students must conform in order to be admitted into the guild" (p. 446).

With respect to regulating teaching and controlling student life, the real power of the university as a corporation in the 13th and 14th centuries was in the hands of the members of the four nations and arts faculty of the university. These nations elected their own proctors, who acting collectively as the faculty of arts, elected the rector, and had the majority of votes needed to create university policies on which norms and future precedents were established. Kibre (1948) noted that the nations through representation in the arts faculty were indirectly

responsible for determining and regulating course content, hours, and method of lectures; determining graduation requirements for both bachelor's and master's degrees; fixing the details for licensing; and setting the academic timetable. At the undergraduate level, the nations were directly responsible for selecting the undergraduate arts examiners, admitting undergraduate arts candidates to degrees, and conferring the bachelor's degrees. Administratively, the nations closely supervised and evaluated their arts schools which provided the bulk of instruction for the faculty of arts.

According to Cobban (1975), the proctor of each nation had responsibility for collecting students' fees, and, judicially, each proctor served as the court of first instance for his nation. In conjunction with the rector, the proctors combined to form the studium's court which dealt with cases relating to violations of statutes or disciplinary regulations. The nations as constituents of the faculty of arts held this prominent position of power, according to Cobban (1975), until the middle of the 15th century at which time the determination of the centralized monarchy to circumscribe power by nationalizing the university along with a continuing decline in foreign student populations forced the nations into a largely bureaucratic role. Cobban (1975) concluded that the nations during the 13th and 14th centuries were

> administrative, educational, and fraternal units [which] provided the immediate framework for the life and work of the masters of arts who composed the majority section of the teaching force; and, through the latter, nation benefits were extended, though how far is not satisfactorily known, to the associated students in arts. (p. 90)

The contrast between the power exercised by students in Bologna and absence of student power in the magisterial guilds in Paris was addressed by Cobban (1975). He maintained that Bolognese student power was an aberration, while magisterial power was a product of medieval social norms and practices. Parisian students were quite young, legally and politically inexperienced, and not generally as affluent or socially influential as their southern counterparts. Cobban (1975) stated that frequently these students viewed membership in the guild as "one of the few or even sole means of modest social advancement" (p. 190). By necessity, they acquiesced to the medieval notion that personal considerations of the individual were subordinate to the collective good of the community (Ferguson & Brunn, 1969). In exchange for the magisterial guild's protection from "hostile external parties" and the acquisition of scholarly privileges which insulated all those associated with the university from civil regulation and laws, the students accepted a position in which they were subject to masters who served as their guardians in loco parentis with the inherent authority to impose the magisterial guild's

disciplinary provisions which all masters had sworn to uphold. Indeed, the guild system was structured such that students perpetuated this tradition when they reached the level of masters themselves. Moreover, in the medieval society, the exchange of one's individual freedoms was offset by the advantages gained through the protection offered and the privileges secured by the autonomous university, for, according to Ross (1976), "discipline in the university was less harsh than in the large community" (p. 70).

The Oxford Archetype

Though there is not complete agreement on how or exactly when Oxford University began, noted authorities (Holland, 1891; Mallett, 1924; Rashdall, 1936; Salter, 1936) have traced the emergence of Oxford as a studium generale to the latter part of the 12th century. Mallett (1924), the noted Oxford historiographer, stated that very early in its development, Oxford masters organized as a corporation and adopted the magisterial guild archetype earlier originated at Paris. The Parisian masters' guild evolved into the University of Masters, and this precedent was followed at Oxford. The masters' guild was the pattern of organization which early established the legal relationship between the university and the students at Oxford.

According to Kibre (1962), while variations in the circumstances which led to grants of special privileges

occurred, essentially, the same kind and extent of rights and privileges were extended to the Paris and Oxford masters and by association to their students. In concordance with previous medieval custom which had been incorporated into canon law, the lay scholars had ecclesiastic protection, support, and a direct line to the papacy as its lay instructional arm; hence, the university masters at Oxford naturally assumed for themselves the rights of privilegium scholasticum, which were extended to lay scholars as well as ecclesiastics. As at Paris, the members of the Oxford guild used cessation and migration from Oxford as an effective tool to call attention to violations of their assumed rights and to force imperial recognition and endorsement of privilegium scholasticum, which had been granted previously by civil law in the Authentica Habita and in papal bulls.

Unlike University of Paris, Oxford University was not an offspring of the cathedral school movement. Kibre (1962) reported that Oxford masters and scholars turned to the English monarchy, and not ecclesiastic authorities, for the crucial support and endorsement they needed. The authority that the chancellor of the cathedral schools in Paris had exercised over the university was not replicated in Oxford, because at the university's inception, the town of Oxford had no resident chancellor, no cathedral church, and the bishop, who delegated episcopal powers, was in distant Lincoln (Mallett, 1924). Although the Oxford magisteriterial guild's

original claims to inherent scholarly privileges were predicated on papal edicts and Roman civil and canon law, and the first charter recognizing these came from the Legatine Ordinance of 1214, early custom established a tradition which placed the monarchy at the center of Oxford University rights, privileges, and immunities. Kibre (1962) noted that from the reign of Henry III, who guaranteed existing scholarly privileges in law, successive English monarchs customarily reaffirmed university rights and privileges and frequently amended the general law to safeguard the scholars' welfare. Undergirding the monarchy's solicitude for scholars was "the assumption that the king and Parliament were supreme over all the kingdom, and that in this regard the university was no exception" (Kibre, 1962, p. 329).

The Chancellor of Oxford originally received his authority from episcopal power delegated to him by the Bishop of Lincoln by virtue of the scholars' clerical status. However, the source of the chancellor's power gradually became secular when it became accepted practice for the university masters to elect the chancellor every two years and to send a representative to merely present this choice to the bishop for automatic confirmation. Cobban (1975) explained the result of this practice:

> In this way, the masters made the de facto election (viewed as a "nomination" by the bishop) and the bishop retained the de jure right of appointment. Thus, from being an officer set above and apart from the masters, the chancellor quickly became

> in every sense one of their number and the champion and embodiment of the autonomy of the guild. (p. 103)

Although the bishop did not appreciably interfere with university administration, the university scholars fought and won in 1367 a battle to dispense with the bishop's right to confirm the chancellor's election (Mallett, 1924).

While the University of Paris's rector was elected by the nations, his term of office was only 3 months. His power in comparison to Oxford's chancellor was diluted because of the short duration of his term. Furthermore, the University of Paris was subject to the entrenched authority of the Parisian bishop and the Chancellor of the Cathedral Church of Paris, who both resided in Paris and whose authority could only be curbed by papal edict. Moreover, the University of Paris's imperial support came from a monarchy which resided in the same city and could ill afford to tolerate the total autonomy of any powerful institution which might challenge its authority. In sharp contrast, the Chancellor of Oxford, who soon came to represent the will and judicial power of the university itself, was not viewed as hostile by the scholars because "he owed his own existence to the university" (Rashdall, 1936a, p. 44). The Bishop of Lincoln was not a serious threat because he was too far away to have significant impact, and the monarchy was not confronted with a university which might threaten its authority in its own capital. Hence, in contrast to Paris, the office of the

English chancellor at both Oxford and Cambridge was permitted to emerge as an unusually powerful and unique office. Commenting on the unique character of the chancellor's office and its unparalleled concentrated power through the amalgamation of spiritual, civil, and criminal jurisdiction, Cobban (1979) reported that

> spiritual jurisdiction, derived from the bishop of the diocese, was translated into ecclesiastical powers of the chancellor's court which was conducted on canonical lines. Through his court, the chancellor exercised ordinary jurisdiction (as a index ordinarius) and quasi-archidiaconal powers over the scholars as clerks, which embraced such matters as discipline, correction of morals and probate of wills of members of the university who died within its precincts; his authority was underpinned by threat of deprivation of academic privileges, including the license, and, if necessary, by sentence of excommunication. By a series of royal grants the chancellor also acquired cognisance in many categories of mixed cases involving scholars and townsmen, although these mixed cases were the subject of perennial jurisdictional dispute; and as a resident presiding head of the university he was, rather like a modern vice-chancellor, ultimately responsible for the supervision of all the manifold strands of educational and administrative life of the studium. (p. 104)

Apart from the increased authority of the Oxford chancellor, other aspects of the Oxford constitutional development rendered it quite different from the Paris system. Although essentially the curriculum of studies and requirements for a degree were quite similar, the role of the nations and the superior faculties differed considerably. At

Oxford, the chancellor and two proctors, not the rectors and arts faculty, performed the university's public business and made most of the academic decisions which affected the lives of students. It was also the chancellor and proctors who handled the university finances and enforced university disciplinary statutes regulating student behavior. In as much as the chancellor was elected by and responsible to the university masters, Oxford was influenced by the Parisian magisterial guild pattern and followed a pattern whereby masters controlled the university, and students, who were subject to their dominion, had no power.

As the role of the chancellor evolved at Oxford, so did the role of the other members of the guild. Initially in the 12th century, masters had gathered at Oxford from many parts of the island and continent. These masters attracted student apprentices to lodge and study with them in houses which were spread around Oxford in what became known as halls. For a consideration, these masters carefully trained those young students whose parents had agreed to such an arrangement. After lengthy study, the students became masters also. Eventually, this system led to groups of masters, who came to be known as fellows, forming faculties who were subject to the authority of the chancellor. Later, beginning in 1560, Oxford developed the college system in which students, called commoners, paid board, lodging, and tuition to the university whose fellows disciplined, protected, and taught morals and

academics to their wards, the commoners (Salter, 1936). By the unique jurisdiction granted to the chancellor, the university masters also defended, insulated, and shielded their wards from all outside influence, subject only to imperial circumvention of the chancellor's authority. According to Ross (1976), the actual physical structure of the college suggested the university authorities' desire to encapsulate the student behind walls. Ross (1976) contended that this restrictive immersion may have been beneficial in some respects, but this greatly restricted mobility "made him more dependent on, and more subject to the will of, the authority of the university to which he was bound" (p. 70).

The medieval students acquiesced to the authority of the fellows and university hierarchy and accepted without major protest the role of low status and little recognition which was defined for them. According to Kibre (1962), in comparison to other residents in Oxford and frequently at the expense of the Oxford commonalty, an Oxford student had many advantages as a protected ward of the university community. A thorough discussion of all the rights and privileges of the university through royal writs and the ascendancy of the chancellor's authority over townsmen and burgesses is beyond the purview of this dissertation. Some of the 400 royal writs possibly relating to the university in the 14th century are collected by Salter (1920) in his Munimenta Civitatis Oxonie. A brief sample of some of the more interesting which

affected student life include the following: all citizens were to repair the streets in front of their houses, remove decaying refuse from in front of their houses, and remove swine from the streets so that masters and students could safely traverse and breathe clean air (1305/1920, pp. 10-11); all houses which could be spared should be leased to the university in keeping with previous promises because the term was about to begin (1303/1920, p. 3); the chancellor was to have complete control of the assize of bread and ale to prevent price gouging and the sale of inferior quality bread or ale (1311/1920, p. 15); the chancellor was to be present at the town's assay of weights and measures to assure that these were in no way fraudulent or defective (1320/1920, pp. 37-38); all regrators were prohibited from melting tallow in the streets because the fumes made some masters and scholars sick (1305/1920, p. 13); no butchers would be permitted to slaughter large animals in the city's public places because the rotting entrails and blood which were left behind were creating putrid stenches and causing many students to become ill and a few to die, in addition to causing potential new students to be repelled by such disgusting and unhealthy circumstances (1310/1920, pp. 13-14).

Obviously, by today's standards, the cost of the students' individual freedom in exchange for the academic community's protection might seem great, especially in light of today's constitutional rights; however, what some might

readily classify as a contract of adhesion did not seem as one-sided within the social and political context of the Medieval Period. With respect to student life in the Middle Ages, Rashdall (1936b) made this observation:

> Indeed, to the ambitious youth of the thirteenth century whose soul rebelled against the narrow limits of his native manor, his native farm, or his native shop, or against the humbler lot to which numerous brothers might condemn a younger son, there were but two advancements open. For the boy of sinew and courage war offered chances . . . to the boy only of brains and energy the universities brought all the glittering prizes of the Church within the limits of practicable ambition; and even apart from prizes, learning and academic position secured social status. (p. 444)

The Common Law and the In Loco Parentis Doctrine

Common law was the law of the Middle Ages which developed in England after the Norman conquest in 1066. It was developed by judges whose decisions in individual cases were based on community customs, traditions, and precedents from previous cases with little or no reference to written statutes. This body of law, not written in statutes, but common to the people of England from the Middle Ages on, was in sharp contrast to the written Roman civil law system accepted by most Europeans of the same period. According to McLauglin (1983), this body of law which developed case after case in court decisions continued to evolve through the 18th century in England, representing in each generation what

society deemed to be "convenient or proper at the moment" (Wormser, 1962, p. 255).

During the 18th century, Blackstone in his classic, Commentaries on the Laws of England (1776-1779/1884), wrote the most authoritative treatise on the law up to his time. In this treatise, he systematized and clarified a wealth of common law. Blackstone's commentaries on the full development of the common law, along with Coke's commentaries of the previous century, preserved the common law principles and rules of actions.

With respect to the university, one of the customs and traditions passed down through the common law which Blackstone (1884) noted was the special status accorded students and masters. Blackstone traced this customary privileged status back to the Justinian Code into which the Bologna law scholars had strategically inserted the 1158 Authentica Habita of Frederick I. Another tradition which Blackstone recounted as part of the common law tradition was the doctrine of in loco parentis. Concerning this doctrine, Blackstone (1776-1779/1884) stated that a parent

> may also delegate authority, during his life, to the tutor or schoolmaster of his child; who is then in loco parentis and has such a portion of the power of the parent, viz. that the restraints and correction as may be necessary to answer the purpose for which he is employed. (p. 453)

Applying the in loco parentis doctrine, the university masters assumed responsibility for their wards' moral and

intellectual development, living conditions, kinds and extent of entertainment, and modes of punishment, if any. Moreover, the university masters' domination over nearly every aspect of the very young students' academic and extracurricular lives came to be accepted practice and soon grew into solid tradition. This tradition continued to gain strength over the centuries as it was reinforced in common law.

Unique to the English common law system was the rule of stare decisis. Applying this rule, judges relied on precedents established in earlier similar cases to determine subsequent cases. They followed these precedents until the public placed sufficient pressure on legislators to change the laws from which the precedents had derived. Over the period when English common law was supreme, the courts, governed by the rule of stare decisis, were not prone to make changes in the law by abandoning precedent if they could slightly alter or amplify extant common law to bypass precedents which were too inflexible. In this way, the legal patterns gradually evolved to represent a public policy reflective of changing social patterns. Justice Holmes (1881) made the following comment on this relationship between legal patterns and public policy:

> Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under practices and traditions, the unconscious result of instinctive preferences and inarticulate conviction, but nonetheless

> traceable to views of public policy in the last analysis. (p. 35)

The relationship which developed between the university and the student at Oxford and subsequent English universities was yet another example of the interaction between public policy and evolving legal patterns. The medieval guild tradition which developed and flourished in English universities slowly evolved into a public policy whereby the university masters stood in loco parentis over their students, assuming all the rights, duties, and responsibilities incidental to the parental relationship. The genesis of the contractual relationship between the student and the American university can be traced to these early social and legal patterns which were supported by common law.

Summary

Long before the advent of the Middle Ages, speculation about truth, interest in philosophy and aesthetics, and concern for the transmission of learning had been an important part of eastern and western culture. However, the concept of a university in institutionalized form was an indigenous product of western Europe during the 12th and 13th centuries. The studium at Bologna established the model for provincial French and southern European universities, while the studium at Paris established the prototype for northern French, English, and central European universities. The

organizational form of Oxford and Cambridge was patterned after the general characteristics of the Parisian system, but the system of residential colleges which emphasized a close interaction between undergraduates and their residential masters was peculiar to the English university system.

The earliest Italian and French studia arose from efforts to provide for instruction beyond the range of that provided to priests and monks in the cathedral and monastic schools. Centers for higher learning, studia, were founded, and a few of these centers, to which only local students were first attracted, soon increased in reputation and were able to attract students from all parts of Europe. Toward the end of the 12th century, those great medieval studia which were able to attract foreign students became known by reputation and general consent as studia generalia. By the 13th century, the distinction of studia generalia became associated with the privilege of conferring universally valid teaching licenses (degrees), a right granted each studium by papal or imperial bull.

A great revival of interest in legal studies in the 11th century brought scholars from throughout Europe to the Bolognese studium generale. These students were wealthier, more mature, and more sophisticated than those at other studia, as many were church or state leaders, drawn to Bologna for advanced study of civil and canon law. In the environs of the studium towards the end of the 12th century,

these law students formed universitates, or guilds, for their mutual safety and protection of property. Under Roman law, students from outside Bologna were considered legal aliens and had no civil rights. The grouping of students first into loosely organized societies of scholars and then the union of the subsequent universitates into larger nations representing the geographic area and national origin of this confederation was a logical response to the Italian social and legal environment of the 12th century. Roman law contained support for the existence of the scholarly guilds and recognition of the right of all guilds to govern themselves, regulate the behavior of their members through oaths of obedience, and discipline disobedient members.

Prior to 1158, professors of liberal arts and clerical scholars had enjoyed special privileges and immunities granted to them by Roman civil and canon law. In 1158, Emperor Frederick I extended similar protection in the form of privilegia scholariam to students who traveled to imperial lands to study at legitimate studia generalia because they were vulnerable without citizenship or imperial protection. Among the protections granted by the secular authority of the emperor, an extremely important privilege students received was the right to reject the judicial authority of the city magistrates and instead elect to summon their opponents to their own courts and have their cases heard before the bishop or judges in the university courts. Subsequent jurists

greatly extended the privilegia scholarium granted to scholars in the Authentica Habita to students' families, their servants, their households, and others who rendered services to the university or the scholars.

Frequently, the failure of the town people to respect scholarly privileges and immunities brought the commune and the university community into conflict and resulted in the guild members' threat of cessation of lectures or actual migration to another studium generale. To resolve or lessen these conflicts, the papacy and the commune from time to time provided additional privileges to the scholars. In substance, these rights guaranteed students adequate housing, fair trade practices, and exemptions from the military service, tolls, taxes, and the duties and responsibilities of other citizens. Invocation of these special rights sometimes led to abusive treatment of the town people and excessive demands on the teaching masters.

While the Bolognese students formed guilds that formulated their own rules and regulations and contracted with masters to teach them, at Paris, the relationship between masters and students was different. In Paris, following more customary patterns, the masters formed guilds. These Parisian magisterial guilds were extended the privileges granted to law scholars in the Authentica Habita and were given corporate rights in subsequent imperial and papal bulls. In the early stages of their development, the

members of the Parisian guilds, who later united forces to become a University of Masters, looked more to Parisian ecclesiastical authorities rather than to the Capetian kings for support and protection. The stability provided by ecclesiastical support was essential for the university's early survival; however, the university scholars experienced difficulty later in forging full corporate independence and academic freedom in the face of attempted ecclesiastical control, particularly by the Chancellor of Notre Dame. In the Parens Scientarium of 1231, the chancellor's attempted domination was broken and after this change, the University of Paris gradually was permitted the corporate rights due autonomous guilds. The members of the magisterial guilds could elect officers, create governing statutes, and punish disobedient members. Furthermore, the guild membership could formulate rules, regulations, and disciplinary procedures under which students might be apprenticed to masters in the guild for a fixed period of time and for a set fee. Invoking the authority of the guild, the guild members could require the student to satisfactorily complete a prescribed curriculum and meet specific academic standards before granting one of three degrees: the baccalaureate degree whereby the student was permitted to teach under the direct supervision of a master; the master's degree whereby the student was granted a license to teach; and a doctor's degree whereby the student was permitted to be publically examined

and, contingent upon satisfactory performance, to be allowed entry into the masters' guild.

Armed with initial papal support and subsequent increased imperial support, the leaders of the magisterial guild established the relationship between the university and its students whereby the students had few rights other than those granted to them by virtue of their association with the guild. Students below the level of Master of Arts could not vote or participate in assemblies of the arts faculties or nations. The undergraduate students were subject to the authority of the proctors of the nations who served as the courts of first instance in cases of breach of statutes or discipline. Moreover, all students were subject to the terms established by the magisterial guilds, and the university authorities, by law and academic tradition, had the intrinsic right to determine the terms of this association.

The masters at Oxford followed the archetype established at Paris and adopted magisterial guilds rather than student guilds. However, the magisterial guilds at Oxford were not an outcome of the cathedral school movement. While ecclesiastic authorities at University of Paris greatly influenced university activities at the outset, their impact was never as great at Oxford, since many of the Oxonian scholarly privileges came from English imperial support and not from the bishop or chancellor. These ecclesiastical authorities did not reside in the same town as the

university; hence, their power and influence was more limited from the outset.

The independent standing of the position of chancellor was also indigenous to Oxford. The Chancellor of Oxford was originally appointed by the Bishop of Lincoln, but in the early evolution of the university, the chancellor came to be elected by the masters. Unlike the situation at Paris, the chancellor became the champion of the magisterial guilds, promoter of university autonomy, and a defender of university interests. As such, he did not alienate the guilds, nor was he a roadblock in the fight for corporate autonomy; hence, he experienced no real challenge to his power. He served as a buffer between the university community of masters and scholars and a variety of external communal and ecclesiastical forces. Moreover, as the undisputed head of the university, the chancellor wielded extensive concentrated power and spiritual, criminal, and civil jurisdiction in all cases involving university scholars and in many mixed cases involving town and gown disputes. The chancellor's court essentially supported the power of the magisterial guilds over their student apprentices.

The relationship between the English university and the student, in which the university administration and faculty had almost unlimited authority over the student, was recognized by English common law. The English common law tradition of *in loco parentis* developed to characterize the

parental authority delegated to the schoolmaster to train, supervise, and discipline the student in the place of the parent. Applying the in loco parentis doctrine, the university masters assumed responsibility for students' moral and intellectual development, living conditions, entertainment, and punishment. Through the common law, the university scholars gained the right to determine the terms of their association with students by virtue of traditional rights and privileges granted in papal and imperial bulls and through the corporate autonomy of the guild.

The medieval guild traditions which developed and flourished in medieval England became a basis for some of the legal system which evolved over time. Legal patterns were based on community customs, traditions, and precedents, and the common law was altered to accommodate changing public policy. The contractual relationship between the American university and the student can be traced to the early social and legal patterns which were expressed in English common law and transplanted to American education in the 17th century.

CHAPTER III
HIGHER EDUCATION FROM THE COLONIAL PERIOD TO 1850: THE INTERACTION OF OLD WORLD TRADITION WITH RISING SECULAR CULTURE

> The shape of education in any time and place is largely a function of the interaction of the institutionalized forms of behaving solidified or leavened by the dominant beliefs and ideas of the people who control the educational process.
>
> (Butts & Cremin, 1953, p. 45)

Contemporary attitudes of American higher education leaders toward the contractual relationship between the student and the university are predicated on attitudes and ideologies which were transplanted from Europe and "took root" during the colonial period of American higher education. One of the most striking things about these formative years in American higher education was the convergence of various social, historical, and legal patterns and traditions which molded and influenced what was later to become a unique concept of higher education. Hence, to analyze the historical development of contract as a method of characterizing the legal relationship between the student and the university, the following colonial antecedents are addressed: the establishment of sectarian private university education with its adoption of the English residential model

and the attendant in loco parentis legal concept, society's widespread endorsement and perpetuation of in loco parentis, opposition to orthodox Calvinist ideology and the rise of secular ideas as reflected in educational practices, the judicial policy of academic abstention; and the creation of the first real state universities.

The Establishment of Sectarian Private University Education with Its Adoption of the English Residential Model and the In Loco Parentis Legal Concept

According to Ross (1976), the founding of Harvard and the other subsequent colonial colleges established a prototype unlike the rich and diversified pattern of higher education which most academics associate with contemporary American education. In the colonial colleges, curriculum, student laws and regulations, housing patterns, and all other aspects of collegiate life were essentially the same. Ross (1976) further contended that up to 1850, all American colleges and universities also "reflected the dominant culture of the day in terms of social class, race, and religious outlook" (p. 26). Moreover, dominant culture at the time the Puritans first disembarked on American soil was essentially the culture of 17th-century England where university education was male-dominated, sectarian, essentially restricted to the upper class, and designed to train an elite group who were devoted to perpetuating and

leading the church and the established government (Ross, 1976).

According to Brubacher and Rudy (1976), at the time English colonization began in America, the English university was not the university of research and scholarship commonly associated with contemporary Western Europe. Seventeenth-century English universities were limited in function and more interested in maintaining the established order than in researching unorthodox ideas or promoting intellectual initiative. According to Ross (1976), this philosophy of education which stressed instruction, rather than original research, led to a conception of undergraduate education which featured three aspects:

> (1) the small college and shared domestic life of student and teacher, (2) the tutorial--the regular face-to-face meeting of student and tutor to explore and discuss the lessons or topics of the day, and (3) the idea of in loco parentis by which the university assumed responsibility for the care, discipline, and full development of each student. (pp. 18-19)

Hence, the pioneer Puritans, who had 100 Cambridge and 32 Oxford scholars (Dexter, 1896; Morison, 1935) among their group, transplanted these three familiar aspects of the English philosophy of university education to Harvard as they attempted also to establish an institutional vehicle for preserving and transmitting Puritan ideology and culture in the American wilderness.

The prominent position afforded education in Puritan society was not entirely due to a love of learning. A detailed look at Puritan culture (Morison, 1935) revealed that Puritan educational goals were in part a reaction to attacks by factious groups within the greater Puritan movement. At the same time Puritan educational programs were also part of an overall response to threats of Puritan extinction by church and state officials who supported Church of England liturgy, organization, and rituals. The lingering papist influences in extant Church of England policies and doctrines were repugnant and oppressive to 17th-century Puritans and other religious denominations as well.

All followers of mainstream Puritanism wanted to reform or purify the Church of England both in doctrine and discipline; however, some factious groups within Puritanism preferred the teaching of simple religious truths by unlettered prophets to the more intellectual religious instruction of educated clerics who had studied Greek and Latin formal theology and had learned the Bible through syllogistic interpretations (Morison, 1935). Many leaders of these factions felt that university training was actually a hindrance to piety. They were constantly launching campaigns to remove religion from the universities where the masters had exercised monopolistic control over clerical education since the Middle Ages (Miller, 1939).

Along with these factional disputes within Puritanism, 17th-century Cantabrigian Puritans were under assault by Elizabeth I and subsequent political leaders who wished to stamp out opposition to the state church. In 1510, the Elizabethan Statutes, a code of governance for Cambridge, had been designed to suppress Puritan dissent at Cambridge by forcing every aspect of university policy to conform with Church of England policies and dogma. On the heels of the Elizabethan Statutes, James I had required all university graduates to swear oaths of loyalty to Church of England rituals and liturgy. Furthermore, at Oxford, statutes created to combat Puritanism were strictly administered by a political appointee, Archbishop Laud, who used all political means available to purge universities of Puritanism (Morison, 1935). Assaults on Puritan ideology within education from these forces, plus factional opposition to an educated clergy within Puritanism, combined to pose a serious threat to the religious and intellectual freedom of lettered Puritans in the first third of the 17th century. Under this constant oppression, educated Puritan leaders came to view higher education as a prized vehicle which could insure the survival of their societal goals and their religious heritage, suppress dissent within their ranks, and combat extinction. Thus, these Puritan leaders, just 7 years after they began colonization, founded Harvard in 1636. This first American university was established to maintain intellectual standards

and to advance the cause of education, as higher education was seen as an essential part of Puritan survival as a group.

In 1584, Emmanuel College had been specifically erected as a Puritan foundation by Sir Walter Mildmay who had sympathy for the Puritan cause is spite of his position as a trusted advisor to the Puritan opponent, Queen Elizabeth. Emmanuel College became Cambridge University's training ground for Puritan ministers, and, according to Hofstadter and Metzger (1955), "the primary nursery of the learned minds of New England" (p. 74). Indeed, Harvard's own benefactor, John Harvard, was one of 35 university emigrants who had attended Emmanuel College. Harvard and other influential Cantabrigians such as Trinity College's Nathaniel Eaton, first head of Harvard, Magdalene College's Henry Dunster, first president of Harvard, and Trinity College's Charles Chauncey, second president of Harvard, were all accustomed to the collegiate residential style of education. At Oxford and Cambridge, this arrangement was deemed no less essential than books or lectures.

With respect to what Cotton Mather (1702/1979) referred to as the "collegiate way of living" (p. 7), Morison (1935) observed that

> to the English mind, university learning apart from college life was not worth having; and the humblest resident tutor was accounted a more suitable teacher than the most eminent community lecturer. Book learning alone might be got by lectures and reading; but it was only by studying and disputing, eating and drinking,

> playing and praying as members of the same collegiate community, in close and constant association with each other and with their tutors, that the priceless gift of character could be imparted to young men. (p.252)

This residential style of higher education not only suggested that the young students needed role models for character development, but it also implied that masters were needed to provide constant moral supervision and to mete out strict but fair discipline in loco parentis. Naturally, Harvard's founders and subsequent administrators held the collegiate style of education in high regard because it reinforced English values and academic traditions they felt were worthy of emulation. Hence, from its inception, Harvard's academic leaders adopted the English residential model of education with its attendant in loco parentis concept. As the prototype for all subsequent private sectarian universities, Harvard became the model which would closely be followed from the colonial period to 1850.

Puritan Society's Endorsement and Perpetuation of the In Loco Parentis Doctrine

The Puritan society's widespread acceptance of the authoritarian collegiate method of higher education was quite in line with Puritan notions of child psychology and educational method. According to Butts and Cremin (1953), this concept of child was a direct result of Puritan society's acceptance of Calvinist theology. Calvin, who was

considered by Wormser (1962) to be one of the most influential men in the development of law in the 16th century, was a religious reformer who saw righteousness as the most important focus of his reform. In Calvin's world view, ideas of personal freedom and individual liberty were of little importance (Wormser, 1962). The individual's duty was to obey God, whose omnipotence was the source of everything that happened (Fleming, 1933). Absolute obedience to the authority of magistrates, parents, and elders was naturally a child's duty, for it was God who had given these elders power, and obedience to elders was a way of acknowledging divine sovereignty (Butts & Cremin, 1953; Cantor, 1970).

In addition to Calvin's central doctrine of divine sovereignty, other Calvinist ideas which permeated much of American society for the first 150 years included an emphasis on "God's power and Wrath, original sin, reverence and fear of God, [and] obedience to His commandments" (Butts & Cremin, 1953, p. 66). Fleming (1933) also noted that Calvinism placed great emphasis on total depravity, a doctrine which attributed man's current depraved state to his inheritance of Adam's original sin and to his daily commission of sinful actions which were a consequence of this flawed state at birth. A corollary of this idea was the notion that because of his depraved condition, man was unable to repent and seek salvation through his own efforts.

In terms of accountability for depraved behavior, the Calvinists granted no leniency to children because of their youth and vulnerability. Children were viewed as miniature adults and judged by harsh adult standards in spite of a recognition that they were negatively influenced from birth by the pervasive total depravity of society at large (Fleming, 1933). Extending his ideas about the nature of children into everyday family life, Calvin formulated and preached a very authoritarian concept of child rearing which the early colonial Puritans adopted. This concept of child rearing also became the backbone for early colonial educational ideas about the role of education in child development. When these educational ideas were translated into method, they were characterized by an emphasis on fear of a powerful and very wrathful God, fear of the dire consequences of sin, stern discipline to restrain the child's evil nature and to instill in the child a fear of breaking God's commandments, and strict authority of all parents, elders, and school officials (Butts & Cremin, 1953).

Evidence of the pervasiveness of this Calvinist influence on 17th and 18th-century social and intellectual life can be readily seen in the words and ideas of influential colonial figures. One of the foremost early colonial spokesmen for the Calvinist world view was John Cotton, a famous Boston minister who had lectured at Cambridge's Puritan stronghold, Emmanuel College, before suppression of Puritan dissent had

forced his emigration. Cotton ardently espoused a Calvinist orientation toward children that mandated harsh discipline and absolute unquestioned obedience as a curb for the colonial child's inherent wickedness. So severe was he that he proposed the use of the death penalty for undisciplined youth who struck or cursed their parents or persisted in riotous or drunken behavior after parental admonishment.

Puritan society was not only inundated by Cotton's ideas on child rearing from his Boston pulpit, but also by his incorporation of these Calvinist ideas into a catechism which he published by 1646 to instruct children in Puritan principles. Beginning in 1690, Cotton's catechism reached an even broader audience when it was published as part of the widely read New England Primer. In the catechism, Cotton included all the rudiments of Puritan dogma and an interpretation of the Ten Commandments. As part of the commandment of honoring parents, colonial children were instructed that this commandment embraced all authority figures, including teachers (Butts & Cremin, 1953).

Cotton Mather (1663-1728), son of Harvard President, Increase Mather, and grandson of John Cotton, was an equally respected colonial voice. This Puritan minister described definitively in his tract, A Family Well Ordered (1699), the appropriate role of Puritan parents in training their children. His stern authoritarian approach reiterated the views of Calvin and Cotton. Mather admonished parents to

subject their children to absolute parental authority, to sternly discipline them using the rod when necessary, to train them to refrain from challenging other superior authority, and to serve as righteous role models. Since Mather viewed the goals of home, church, and state as tightly interwoven, all ministers, teachers, and political leaders were likewise charged with the same responsibilities over their wards as parents were over their children. In Mather's theocratic world view, society's members were not to sanction any challenges to authority by children. In essence, the word of parents or authority figures was tantamount to law (Butts & Cremin, 1953).

The authoritarian attitudes about the proper relationship between children and their elders espoused by Cotton and later Mather continued well into the 18th century. The fiery New England minister, Jonathan Edwards (1750/1904), admonished New England parents and children in the middle of the 18th century in a manner quite reminiscent of Calvin in the 16th century:

> Let me now, therefore, once more, before I finally cease to speak to this congregation, repeat and earnestly press to the counsel which I have often urged on heads of families here, while I was their pastor, to great painfulness in teaching, warning and directing their children; bringing them up in the nurture and admonition of the Lord; beginning early, where there is yet opportunity, and maintaining a constant diligence in labors of this kind; remembering that, as you would not have all your instructions and counsels ineffectual, there must be

> maintained with an even hand and steady resolution, as a guard to the religion and morals of the family and the support of its good order. Take heed that it not be with any of you as with Eli of old, who reproved his children but restrained them not; and that, by this means, you don't bring the like curse on your families as he did on his.
>
> And let children obey their parents, and yield to their instructions, and submit to their orders, as they would inherit a blessing and not a curse. For we have reason to think, from many things in the word of God, that nothing has a greater tendency to bring a curse on persons in this world, and on all their temporal concerns, than undutiful, unsubmissive, disorderly behavior in children towards their parents. (p. 148)

Cotton, Mather, and Edwards were representative of the many leaders whose Calvinist views about the child and the proper relationship between children and their elders in family, church, and state were integrated into the social fabric of Puritan society. Fear, obedience, and discipline were the guiding principles for all theocratic Puritan institutions, and higher education was no exception. Puritan society viewed elders as parental role models, and residential college teachers as elders were likewise viewed as substitute parents with the same parental rights and responsibilities as those of model Puritan parents. As substitute parents, college teachers were delegated the _in loco parentis_ responsibilities of discipline, moral indoctrination, and supervision, in addition to their instructional duties.

Although application of the English common law concept of in loco parentis was the practice in both 17th-century English residential universities and American colonial colleges, the application of in loco parentis at the college level was not given attention in American courts until 1866 (Brittain, 1971). In the colonial period, the customary use of in loco parentis to characterize the university's relationship with its students was reinforced by early college administrative officials who, according to Brittain (1971), used accepted practice and widespread support as a mandate for the use of omnipotent power. Essentially, unquestioned acceptance of this concept by parents, colonial society, and university officialdom gave the in loco parentis concept the strength of law.

With the payment of fees, a business arrangement was established between the institution and the student's parents who acted on behalf of the student (Buchter, 1973). The institutional charter contained details of the entry requirements, the graduation requirements, and all rules governing behavior of students. This agreement between the two parties established an obligation on the part of the university to carry out the parental role of molding college students into educated gentlemen of pious, righteous behavior. This arrangement was designed with little or no regard for student individualism, as student legal rights were not recognized. Moreover, the terms of this enrollment

agreement were consistent with Calvinist beliefs of elevation of righteousness and authority of superiors at the expense of individual freedom.

According to John (1977), this in loco parentis concept was adopted to reflect the supervisory role of colonial colleges "pursuant to the written enrollment contract which served as a business arrangement between the institution and the parents of the student" (p. 41). Brubacher and Rudy (1976) and Wilson (1984) reported that, upon passing the entrance examination, the typical candidate for admissions customarily secured or copied a set of the college laws and had the president inscribe an admittatur on them. This constituted the written enrollment contract or covenant (Emerson, 1977). Written details of the prescribed times and order of studies, student daily schedules, rules and precepts to be observed by students, and procedures for dealing with transgressors of any part of this agreement were printed in 1643 in a progress report entitled "New England's First Fruits" (1643/1935), issued while Henry Dunster was still Harvard's first president. These first rules and precepts were enlarged by legislation of the Overseers and President Dunster, codified about 1646, and presented orally to students in the college hall. These 19 college statutes, which were developed over a 4-year period beginning in 1642, were printed in College Book I. They constituted the

official regulations binding both college and students at Harvard in 1646.

Among these 19 laws which Morison (1935) reprinted in English, are some which illustrate both the flavor and intent of the founders:

> 2. Every one shall consider the mayne End of his life and studyes, to know God and Jesus Christ which is Eternall life. Joh. 17.3.
>
> 6. they shall eschew all prophanation of Gods holy name, attributes, word, ordinances, and times of worship, and study with Reverence and love carefully to reteine God and his truth in their minds.
>
> 7. they shall honour as their parents, Magistrates, Elders, tutours and aged persons, by beeing silent in their presence (except they be called on to answer) not gainesaying shewing all those laudable expressions of honour and Reverence in their presence, that are in use as bowing before them standing uncovered or the like.
>
> 10. During their Residence, they shall studiously redeeme their time, observe the generall houres appointed for all the Scholars, and the speciall hour for their owne Lecture, and then diligently attend the Lectures without any disturbance by word or gesture: And if of any thing they doubt they shall inquire as of their fellowes so in case of non-resolution modestly of their tutours.
>
> 11. Nor shall any without the Licence of the Overseers of the Colledge, his tutours leave, or in his absence the call of parents or Guardians goe out to another towne.
>
> 14. If any Scholar beeing in health shall bee absent from prayer or Lectures, except in case of urgent necessity or by the Leave of his tutour, hee shall be

liable to admonition (or such punishment as the president shall thinke meet) if hee offend above once a weeke.

16. No Scholars shall under any pretence of recreation or other cause what-ever (unlesse foreshewed and allowed by the President or his tutour) bee absent from his studyes or appointed exercises above an houre at Morning-Bever, halfe an houre at Afternoone-Bever; an houre and an halfe at Dinner and so long at Supper.

17. If any Scholar shall transgreese any of the Lawes of God or the House out of perversnesse or apparant negligence, after twice admonition hee shall bee liable if not adultus to correction, if Adultus his name shall bee given up to the Overseers of the Colledge that he may be publikely dealt with after the desert of his fault but in grosser offences such graduall proceeding shall not bee expected. (pp. 333-337)

Yale, founded more than 60 years after Harvard in 1701, was regulated by a charter similar to that of Harvard and the other colonial colleges: William and Mary, Kings College, Rutgers, Princeton, Brown, and Dartmouth. Following the Harvard prototype, the Yale laws for students were replete with specific regulations for student life. While many of the regulations concerned general rules for student behavior, in some of the other prohibitions in the Yale Laws of 1745 (1745/1961), students specifically were cautioned against "wearing woman's Aparrel, Defrauding, Injustice, Idleness, Lying, Defamation, Tale baring or any other Such like Immoralities" (p. 57). They were further admonished not to "call loud or Hollow to any other Scholar in the Presence of the President or Tutors" (p. 57). A student also could not

"associate himself with any Rude, Idle Disorderly Persons" (p. 57) or "go out of the College Yard without a Hat, Coat, or Gown except at his Lawful Diversion" (p. 58). Moreover, if the Yale president suspected a student of foul play, he "or Either of the Tutors may when he [saw] Cause Break Open any College Door to Suppress any Disorder" (p. 58).

Concerning the terms of these kinds of enrollment agreements between the student and the institution, Ohles (1970) noted that

> tradition placed the burden to fulfill obligations on the student. The university had broad powers to establish conditions for admission to the institution, and it could determine the accepted means of continuance and the bases on which successful or unsuccessful termination of a program was to be made. The student was the suppliant; the college was the grantor of privilege. (p. 23)

Van Alstyne (1963) reported that in a personal communication from Henry Steele Commager, Commager suggested that the very young age of entering colonial college boys provided the reason for the use of in loco parentis in colonial colleges. While many Harvard students did matriculate as young as 13 years old, Cremin (1970) noted that the median age of Harvard students from 1650 to 1700 was between 15 and 16. Commager's explanation might provide the total explanation except that, according to Fleming (1933), in Puritan society "there was an utter failure to appreciate the distinction between the child and the adult" (pp. 59-60). Furthermore, portraits of colonial children and

pictures in colonial books depicted children as miniature adults, and extant legal documents indicated that 16 was the age when at least some youth assumed other types of adult legal responsibilities (Fleming, 1933).

A more complete explanation of Puritan society's endorsement of in loco parentis includes consideration of several other factors. Puritan parents wished to maintain English higher education patterns without the scourge of papist influences, and adoption of in loco parentis was perceived as one way to accomplish this. Another factor was that Puritan parents and leaders believed that in loco parentis could serve as a safeguard to the pious development of students. A third factor was that in loco parentis complemented the concept of total depravity in which children were viewed as unregenerate sinners, and, as such, in need of close constant moral supervision and wholesome role models.

Students also shared part of the responsibility for the colonial colleges' use of in loco parentis to characterize the student-university relationship. In spite of the fact that Puritan society regarded its youth as mature at about age 16, colonial students tacitly accepted the authoritarian terms of their enrollment. Harvard students were in no position to assume the same independent legal status and adult responsibilities as their Bolognese medieval counterparts who had possessed either independent wealth or clerical benefices. Presented with circumstances similar to

their English antecedents, colonial students were willing to accept the insulation, nurturance, and discipline of the university in exchange for an opportunity to train for an elite leadership role in colonial society. At the same time, they were also able to forestall entrance into the adult society of the American wilderness with its consequent set of harsh responsibilities and expectations. On balance, the students were willing to be suppliants in exchange for the opportunities a university education could afford them later.

The homogeneous early Puritan society was so unified in its reverence for absolute authority that refusal of students to accept the right of parents to delegate their authority to the university was tantamount to negation of society itself. Thus, the paternalistic attitudes of the university in relations with students were sanctioned and perpetuated by all parties--the university, its students, the parents, and society at large. Hence, once this trend had been established at Harvard, the same method of dealing with students was essentially duplicated at all subsequent colonial colleges, even though they were under the patronage of other denominational groups.

Opposition to Orthodox Calvinist Ideology and the Rise of Secularism as Reflected in Educational Practices

In executing their *in loco parentis* authority, colonial college officials placed an extraordinary emphasis on rules and regulations. While "New England's First Fruits"

(1643/1935), recorded only eight rules and precepts, Morison (1935) reported that by 1866, Harvard's academic leaders had created 16 chapters and 204 articles of disciplinary regulations. From some quarters of society, opposition to such an emphasis on excessive lawmaking began to emerge. Concurrently, philosophical opposition to the severity of Calvinist ideology with respect to the doctrines of total depravity, divine sovereignty, and predestination began to develop. Opposition on these matters, plus resistance to Puritan society's tendency to fail to differentiate between adults and children, served as the basis for various kinds of opposition on the part of several groups within colonial society.

Certainly, some of the most outspoken resistance to Calvinist overtones in Puritan ideology came from some of the more moderate religious denominations. While the Puritans emphasized predestination, total depravity, and absolute obedience to moral and civil law, according to Butts & Cremin (1953), "prominent among those who elevated the role of faith and piety in salvation were the Baptists, Quakers, the German Pietists of Lutheran Europe, and other individualistic Protestant sects" (p. 46). In contrast to the Puritans who viewed salvation as completely subject to divine election, such colonial Arminians as Ebenezer Gay and Jonathan Mayhew vigorously challenged this belief (Wilson, 1984). Gay, who had graduated from Harvard in 1714, led a group of clergymen

who argued that through the exercise of reason, men and women with moral and intellectual determination could influence their spiritual destiny.

Throughout New England and in many other parts of the American colonies, leaders from other religious groups also began to press for acceptance of religious diversity and less authoritarianism in dealing with children. The Quakers, Anglicans, and several smaller religious sects were no less concerned about the inculcation of religious values; however, they argued for educational methods that were characterized by love, gentleness, and a patient and sympathetic attitude toward child nature. Such 18th-century leaders as William Penn (1644-1718), the Quaker who founded Pennsylvania, and Samuel Johnson, the Anglican who served as the first president of King's College, represented this more humane attitude toward children and educational method.

Some deists were among the secular groups that detached themselves from divine revelation and authority and instead emphasized the use of human reason in achieving religion (Sullivan, 1982). They believed in the presence of an impersonal God who created the universe but thereafter left it alone to operate according to definable natural law. Such famous colonial statesmen as Thomas Jefferson, Benjamin Franklin, and John Adams were well-known for their deist orientation. Deism, which was thought to stem from Arminianism, became popular with intellectuals and students.

Deists' emphasis on rationalism and rejection of revelation was favored by many intellectuals who were uncomfortable with upholding divine law at the expense of natural law (Betts, 1984).

While religion was of supreme importance in the eyes of the majority of colonial society, scientists and philosophers gradually began to seriously question the Calvinist view of man as powerless to influence his salvation or initiate change in his life. With the rise of scientific inquiry during the 17th and 18th centuries, the "enlightened " thinkers began to directly confront traditional views about truth, revelation, and authority. The materialists focused on the scientific method as a sole source of truth. Some more moderate philosophers, like Rene Descartes, chose to reconcile theology and science in a dualistic philosophy. Although the philosophical outlook of a few Americans could be represented as materialism or atheism, the majority of American intellectuals in the 18th century "continued to embrace some form of theological or religious outlook as represented in idealism or dualism" (Butts & Cremin, 1953, p. 52). Nonetheless, the scientist and philosophers planted the seeds of discontent with orthodox ideas, and they slowly germinated.

The confrontation between theology and science and philosophy over the source of truth and the nature of man catapulted the western world into an intellectual revolution

which later came to be called the Enlightenment. From about 1715 until 1789, leading thinkers of the Enlightenment celebrated the unlimited power of the human intellect. According to Cantor (1970), "enlightenment intellectuals taught that, instead of looking to God, the Church, and tradition, men had to take care of themselves and organize political, social, and economic institutions in a way that would best contribute to the greatest happiness of mankind" (p. 467). Jean Jacques Rousseau argued for the innate goodness of man, argued against unjust and unequal political institutions, and viewed the church, class, and state as oppressors of the natural values of mankind. Concurrently, the scientific method, in contrast to revelation, was heralded as the new way of investigating and acquiring knowledge and truth. Leaving behind a legacy of liberal and humanitarian ideals, the Enlightenment elevated ordinary man to a new level of dignity and respect. This 18th-century cultural movement marked the turning point at which old assumptions about man, nature, and society were modified, but not completely overshadowed, by the elevation of man's freedom and individualism. This movement brought to fruition many secular ideas that were to influence the very nature of a new nation.

Against a backdrop of rising secular thought and protest against Calvinist theology, colonial American students likewise began to question the authority of all established

institutions. In spite of colonial universities' attempts to restrict and guide the behavior of their wards, Brubacher and Rudy (1976) noted that before 1850 "student rebellions peppered the annals of every college in America" (p. 39). Rebellious behavior primarily derived from expressions of the natural inclinations of high-spirited students or from frustration concerning such things a required chapels, excessively harsh discipline, or poor food. Usually, the general disposition of colonial students was to accept the university's authority. Students used rebellious behavior to focus on problem areas and promote change by irritating those in authority to change offensive policies. However, overtly defiant challenges designed to overturn university authority or those which demanded shared authority were unheard of in the early colonial period and were quite uncommon even after the American Revolution.

In 1834, Harvard experienced the most widely discussed incidence of overt rebellion. In this incident, Harvard's President Quincy called in civil authorities to intervene and further punish the entire sophomore class. These students had broken the windows and furniture of a tutor who had denied a petition of one of their fellow classmates. As a result, all sophomores were suspended and ordered home, and Quincy requested civil authorities to further punish them even though the offense did not infringe on the rights of

those outside the university. Describing this riot, Morison (1965) noted,

> then, hell broke loose! Quincy had violated one of the oldest academic traditions: that the public authorities have no concern with what goes on inside a university, so long as the rights of outsiders are not infringed. The "black flag of rebellion" was hung from the roof of Holworthy. Furniture and glass in the recitation rooms of University were smashed, and the fragments hurled out of the windows. . . . A terrific explosion took place in chapel; and when the smoke had cleared, "A Bone for Old Quin to Pick" was seen written on the walls. A printed seniors' "Circular," signed by a committee who were promptly deprived of their degrees, gave their version of the Rebellion in language so cogent that the Overseers issued a forty-seven page pamphlet by Quincy to counteract it. . . . Quincy never recovered his popularity. (pp. 112-113)

Violence and open rebellion of this same type was not unknown at Yale, Princeton, Brown, Dartmouth, University of Virginia, University of North Carolina, and numerous other respected public and private, sectarian and secular institutions representing North and South (Brubacher & Rudy, 1976; Coulter, 1928; Kelley, 1974). Brubacher and Rudy (1976) credit Princeton and University of Virginia with the worst rioting. At Princeton, where large numbers of southern students attended, college officials suspended more than half the student body at the end of a particularly violent disturbance in 1807. This riot was only one of Princeton's six rebellions between 1800 and 1830 (Wertenbacher, 1946). The faculty members of University of Virginia, where

Jefferson had attempted to create student self-government and had fought for freedom especially in curriculum, were devastated by violence from 1830-1840. During this turbulent era, a professor was killed and civil authorities also had to intervene to restore order (Patton, 1906).

Although faculty members and presidents at pre-Civil War universities and colleges viewed their students' open rebellion as extraordinary occurrences, present-day educational historians view them quite differently. For example, Brubacher and Rudy (1976) considered pre-Civil War campus turbulence as one aspect of the evolving nation's search for a new identity:

> Undoubtedly the phenomenon of student rebelliousness reflected, at least in part, the whole social fabric of America at this time. In this exuberant young nation, there was an inner conflict between an over-repressive, Calvinistic morality and a frontier pattern of heavy drinking and brutal fighting. Violence was general throughout nineteenth-century American society. These conditions found their counterpart on the campus in student revolutions. A modern historian attributes much of this unrest to the new spirit of liberty let loose by the American Revolution. This was heady wine for the younger generation. (p. 55)

The Courts' Policy of Academic Abstention

For over 200 years, students placed under in loco parentis strictures were offered little if any rights in their relations with the university. According to Millington (1979), this system's longevity depended upon two factors:

"student compliance . . . [and] the long-term 'hands-off' attitude of the courts" (p. 34). While the federal judiciary did rule on the Dartmouth College charter issue in 1819, for the most part the judiciary was reluctant to interfere in the internal procedures of colleges and universities. Rabban (1973) gave two explanations for this policy of academic abstention: "a sense of limited expertise and a respect for institutional autonomy" (p. 95).

The doctrine of precedent was a legal tradition which was transplanted to America from England. It was an established tradition in England that universities were to function autonomously. The English university since the 13th century had created its own laws and disciplined its wards according to its own laws. These special rights and privileges had been granted by royal charter. The high value placed of university autonomy also was a value not taken lightly by colonial society. The Harvard riot of 1834 had centered on the students' resentment of civil interference in matters which were deemed strictly university affairs. Just as the English academic world had tended to think of itself as removed from civil law, the recipient of ecclesiastic privileges and immunities, so also did members of American academia.

The judiciary viewed the academic world as best served by an attitude of judicial non-interference. As private institutions with lawfully appointed boards that had been

granted rights which were detailed in a charter, colleges generally were seen as delicate, complex enterprises operating under contractual relations with their students. If colleges were left to develop on their own, the interests of all concerned would be best served as long as this relationship between students and the university did not affect the interests of outsiders.

The judiciary also did not possess a thorough understanding of the complex subtleties of academic rules and procedures, academic self-regulation, and academic freedom, nor could the members of the courts adequately assess academic programs or standards. According to Kaplin (1978), the judiciary viewed college administrators and faculty members as elevated scholars with special missions and special expertise. This idea that academic leaders were a special breed with a special calling to teach instead of preach "spanned the perception that ill-will and personal bias were strangers to academia and that outside monitoring of its affairs was therefore largely unnecessary" (Kaplin 1978, p. 5). Moreover, the courts felt they ran a high risk of error if they interfered in matters where they had no expertise. On balance, the risks did not outweigh the gains. In issues of disciplinary dismissals or breach of contract on the part of the university, the judiciary did have expertise. However, even in these matters, judicial deference prevailed.

Typical of this deferential attitude were the court's words in People ex. rel. Pratt v. Wheaton College (1866):

> A discretionary power has been given [college officials] to regulate the discipline of their college in such a manner as they deem proper, and so long as their rules violate neither divine nor human law, we have no more authority to interfere than we have to control the domestic discipline of a father and his family. (p. 187)

The Development of American State Universities

Training responsible civic leaders had been part of Harvard's original overall goal; however, the Puritan theocratic ideals established by Harvard's founders were not identical to the ideals which the pioneers of American independence wished to perpetuate after the political revolution. The people of the newly established American republic required a uniquely American plan of education which would produce an educated and literate electorate capable of carrying out democratic principles. The citizens of the new nation needed a system of higher education which concentrated more on political rather than religious functions (Gutek, 1970). Thomas Jefferson and several other colonial visionaries saw the state university as one of the appropriate vehicles for achieving the goals of pioneer democracy.

The first attempts to meet demands for state universities which would be free of sectarian control or interests and

which would more widely distribute educational opportunity came in the late 18th century. Several institutions were founded on this premise in the South; the University of Georgia and the University of North Carolina were the first two. According to Brubacher and Rudy (1976), in their organization, control, and curriculum, these newer kinds of colleges still were quite similar to Harvard and the early private colonial colleges. While they were established by state charter and partially funded from public funds, their boards were not elected by the legislature, nor were the universities accessible to all segments of the population. The University of Georgia, founded in 1789, did not have a publicly-selected board of trustees until 1876, and the University of Vermont, founded in 1791, was not placed under public control until 1870. The University of North Carolina had to resort to the courts to prevent the state from reclaiming lands which the state had granted it for financial support. According to Brubacher and Rudy (1976), other institutions of this early type included the universities of Ohio, Tennessee, and Maryland; South Carolina College; and Transylvania University in Kentucky.

The character and flavor of the relationship between the student and the typical early form of state universities can be discerned from the student rules at the University of Georgia. Heavily influenced by Yale men and Yale traditions, the University of Georgia promulgated student laws which were

"Puritanical and puerile after the most approved fashion of the age" (Coulter, 1928, p. 59). Inspired by the laws of New England sectarian private institutions, this code of student laws contained 16 pages. Through these rules, the members of the university attempted to tightly govern every aspect of the student's life. According to Coulter (1928), the following excerpt from early student laws at University of Georgia provides a glimpse of the strictures placed on students at one of the new republic's first so-called state universities:

> If any scholar shall be guilty of prophaneness--of fighting or quarreling--if he shall break open the door of a fellow student--if he shall go more than two miles from Athens without leave from the President, a Professor, or a Tutor--if he shall disturb others by noisiness, loud talking or singing during the time of study--if he shall ring the Bell without order or permission--if he shall play at billiards, cards or any unlawful game--if he shall associate with vile, idle, or dissolute persons, or shall admit them into his chamber--if he shall instigate or advise any student to a refractory or stubborn behavior--he shall for either of those offenses, be punished by fine, admonition, or rustication, as the nature and circumstances of the case may require. (p. 60)

These first attempts at state-sponsored universities were more public in intent compared to their colonial antecedents. However, according to Brubacher and Rudy (1976), for all practical purposes "their charters treated them as if they were private incorporations and the courts backed up this interpretation" (p. 146).

Jefferson realized the need for a much different kind of state-supported university which would serve the secular needs of a growing republic. In the 1770s, he had proposed a revolutionary new kind of university which would be administered, controlled, and continually financed by government. This kind of proposed state university would be free of domination by any religious group and would extend educational opportunity to those who had talent rather than to those who had wealth, social class, and aristocratic privilege. Moreover, at this ideal university students should be provided an opportunity to specialize and elect their own areas of concentration rather than adhere to the traditional classical curriculum typical at Harvard, the great European universities, and the earlier state-sponsored universities.

In 1779, Jefferson tried to make these changes at William and Mary; however, his ideas were only partially successful, and William and Mary did not become a state university. Finally, in 1818, when the University of Virginia at Charlottesville was chartered, Jefferson began to see his vision take shape. The University of Virginia became the first uniquely American state university. During its first 50 years, the University of Virginia was a unique university for that time. And yet, even in its earliest years, it was not the advanced type of institution that Jefferson had envisioned or what we today think of as a research-oriented

state university. Nevertheless, Brubacher and Rudy (1976) contended that there is convincing evidence that the curriculum and regulation of students at other universities were influenced by the prototypic University of Virginia. According to Brubacher and Rudy (1976), University of North Carolina, University of South Carolina, University of Nashville, Transylvania University, Harvard, Brown, Massachusetts Institute of Technology, and University of Michigan were inspired and influenced by the University of Virginia.

With the advent of the first real state university in Virginia, a shift in the mission of the university began to transpire. Strongly influenced by Jefferson, the University of Virginia was not intended to be a nursery for ministers, for Jefferson strongly advocated absolute separation of church and state. Furthermore, he held strong views about the need for public support and public control of education at all levels, for public support was one way to provide a population of heterogeneous backgrounds with an equal opportunity to participate politically, economically, and socially. Jefferson also held the liberal views of the Enlightenment concerning the inherent right of individuals to enlarge their intellectual powers, develop their talents, and make personal choices about their education. Under the influence of Jeffersonian ideals, the American university became more sectarian and egalitarian.

Jeffersonian conceptions of individual liberty and student self-regulation slowly began to affect the relationship between the student and the university. While no radical changes were made in the universities' relationship with their wards, some of the most restrictive expectations began to give way to either tacit acceptance of greater student freedom or increased administrative oversight of student violations of excessively restrictive regulations (Ross, 1976). Gradually, colleges and universities began to treat university students more like young adults than children. Furthermore, in the early 19th century, such extracurricular activities as literary clubs, dancing, intercollegiate athletics, and fraternities were developed to channel displays of excessive youthfulness and more moderate destructive student rebelliousness. Hence, the university's attitude toward students and its responsibility to them continued to evolve. Although the paternalism of *in loco parentis* still characterized relations between students and universities, university leaders who were influenced by the more pluralistic philosophy of the new state university modified the most excessive aspects of its application and promoted a less childlike view of university students.

Summary

Members of contemporary American society have placed on modern college students the responsibility for their own

development, government, financial affairs, and college enrollment. In contrast, members of early colonial American society looked to the parents of colonial college students for payment of tuition and other charges and to college personnel, as delegated parents, to direct the students' development, supervise the students' behavior, and otherwise guide and discipline students throughout their undergraduate careers. Members of society changed their role expectations for students and college personnel very little for the first 200 years.

Patterned after the residential colleges at Oxford and Cambridge, the founders and leaders of American colonial colleges adopted in loco parentis to characterize the relationship between colleges/universities and their students. Members of the university community used the enrollment agreement of this era to hold students responsible for strict compliance with the rules and regulations promulgated by the university administration. Students were bound to the in loco parentis authority of all college faculty, staff, and administration. This legal pattern was in keeping with Puritan society's concepts of child nature, child psychology, and educational method.

As secular thought began to compete with sectarian ideals, college officials gradually relaxed some of the harshest of the student rules and regulations. Supporters of the Enlightenment and the scientific method and less severe

religious groups began to call for greater respect for the dignity of the individual and less authoritarianism in dealing with students. As a result, iconoclasts such as Thomas Jefferson proposed that students be allowed self government and granted more freedom in selecting their curriculum. Jefferson's liberal ideas were later embodied in the creation of the University of Virginia, the first real state university. While Jefferson's liberal ideas were never fully realized, they were an attempt to treat students more as individuals and less as suppliants.

Before 1850, society members' repressive expectations of student behavior resulted in student protests and occasional riots. Harsh discipline, poor quality food, and excessive regulation of student behavior on the part of university officialdom were cited as causes for students' violent and destructive behavior. University personnel were forced to re-evaluate excessive restrictions on students and to relax some of their more offensive expectations because of the turbulent conditions on campus in the period after the Revolutionary War. As the attitudes of society members were changing, students were being perceived more as young adults than as children. Outlets such as intercollegiate sports and literary societies were developed to address the students' needs for fun and relaxation, as well as academics.

From 1636 to 1850, the judiciary merely reflected contemporary attitudes about the relationship between

students and colleges/universities. The courts adopted a policy of judicial non-interference toward colleges and universities. Generally, the members of the judiciary felt limited in their ability to comprehend the complexities of academic life. Furthermore, they carried on the English tradition of granting almost complete institutional autonomy to universities.

From the inception of the colonial American college in 1636 to 1850, colleges and universities were primarily private and sectarian. As a result, their leaders saw themselves as above and removed from the jurisdiction of the courts. Since the leaders and faculty members of colleges and universities welcomed a judicial attitude of non-interference and the courts felt they ran a great risk of erring in matters about which they knew little, members of both groups were content to allow the college and university authorities to continue to exercise in loco parentis authority over students. In essence, the judiciary in recognizing the sanctity of the private university and its right to contract with its students was re-enforcing the attitude and wishes of society members at that time.

Butts and Cremin (1953) have characterized the general state of educational change during the colonial period:

> At the beginning of the colonial period educational thought was dominated by theological, philosophical, political, and social orthodoxies; by the end of the colonial period more and more voices were being heard proposing an education that

> would be more liberal, more secular, more scientific, more utilitarian, more humanitarian, and more democratic. (p. 65)

While educational change in the colonial period was neither quick nor drastic, the years between 1779 and 1850 were marked by changes which set American society and its institutions apart from their antecedents. The faculty members and leaders of American education fell under the heady influence of democratization brought on by the American Revolution. During this time there "emerged a school system as different from its predecessors as was the society which it sought to serve" (Butts & Cremin, 1953, p. 141). The Jeffersonian ideas of universal education were becoming a part of the overall American educational picture, and some aspects of Jefferson's landmark proposal for a state-sponsored university system were taking hold. With the clash of ideals between state-sponsored and private universities and with the advent of the Morrill Act in the second half of the 19th century, the relationship between students and their universities and colleges was to move into another era of change and adaptation.

CHAPTER IV
HIGHER EDUCATION FROM 1850 TO 1900: THE RISE OF THE AMERICAN UNIVERSITY AND THE EMERGENCE OF THE LITIGIOUS STUDENT

> Life marches on, with new conditions and new interests, causing constant judicial development. Other times, other mores; other morals, other laws.
> (Corbin, 1962, p. 1329)

Nineteenth-century students who were willing to seek outside intervention in resolving their disputes with their higher education institutions breached American academic customs and traditions which had been in effect for over 200 years. Since the inception of prototypic Harvard in 1636, officials at colonial colleges had established and enforced rules and regulations for their wards. With few exceptions, college students before the 19th century had not challenged the *in loco parentis* authority of college officials. Beginning in 1844 and greatly accelerating after the Civil War, a new era of student contract litigation came into being. This era was a result of the convergence of religious, social, and political turmoil which was occurring in America beginning about 1850. To analyze the historical and legal backdrop against which student contract litigation began, the following issues are addressed: the political,

economic, and social climate of 1850; the educational environment in the last half of the 19th century; and the evolution of student demands for redress through contract litigation.

The Political, Economic, and Social Climate in 1850

By the middle of the 19th century, those who participated in academic life held many opposing conceptions and attitudes about fundamental educational issues. This plurality of interests in education was a reflection of the multitude of opposing forces which were converging in American society during the same period. From the turn of the 19th century, when Jefferson was elected President of the United States, to mid-century, when strong sectional differences surfaced over the slavery issue, the members of competing forces were constantly vying for political, social, and economic power. During this period, leaders of the opposing forces gained political mileage and engaged in extended debate over the following issues: the moral, social, and economic problems relating to the early expansion of the southern and western borders; the Americanization of the second great wave of immigrants; and the influx of technology and related urbanization. The overriding problem of serious sectional differences, related to the humanitarian and democratic issues of equality and equalization of opportunity,

encompassed aspects of all the other problems and ultimately led to the Civil War in 1860.

Early Expansion of the Southern and Western Borders

By 1830, the population of the United States was 13 million, an increase of 150 % from the turn of the century (Hacker, 1947). The population of the West was doubling each decade, as American farmers, cattlemen, miners, free traders, and rivermen penetrated the American frontier. Because of population movement, the territorial United States had been expanded by the admission of seven new states between 1810 and 1830: Louisiana (1812), Indiana (1816), Mississippi (1817), Illinois (1818), Alabama (1819), Maine (1821) and Missouri (1821).

After 1830, the common folk pushed beyond the Mississippi River and into the near Northwest and the heartland of America in continuing waves. While some built railroads and canals or established commercial and industrial enterprises, others bought cheap land and established farms. These individualistic pioneers were inspired by the democratic belief that the West provided opportunities for the small farmer, urban worker, and common man. For the most part, they succeeded in overcoming their lack of prestige and aristocratic origins and were able not only to settle the frontier but to democratize it as well. This was an era when the entire country was developing a national spirit and a

sense of identity. These pioneers questioned institutions which did not support American social patterns and beliefs, and they supported what was practical and meaningful for life in the wilderness on a day-to-day basis.

As they re-established themselves, the early pioneers transplanted in the area west of the Mississippi River their fundamental belief in equality, especially regarding political and civil rights. They saw common school education as a vehicle for establishing their social ideals, aims, and institutions. However, because they were antagonistic to privilege of any kind, they were not economically or philosophically supportive of the traditional kind of elitist universities found in the Northeast and the South. This traditional institution, which the famous Yale Report of 1828 staunchly defended, represented Old World habits and systems (Rudolph, 1962). The aims and goals of the colonial prototype, Harvard, were not suitable for the ideals at work on the frontier in the early 19th century.

While the pioneers were not willing to finance higher education in the rigorous style of aristocratic Harvard, some did provide private support to the proliferating denominational colleges (Tewksbury, 1932). At the same time the nation was rapidly expanding, it was also involved in a second period of great religious revivals. The leaders of the home missionary movement brought the denominations into the Midwest. The heads of each denomination had felt the

need to train their own ministers and to serve the higher educational needs of students who might otherwise be forced to attend the colleges of competing denominations. The officials of the denominational colleges also felt they could serve society at large by producing graduates who had been schooled in strong Christian ideals and democratic principles. Because the local population which these colleges served associated wealth and success with Jacksonian self-made, self-taught citizens, they saw no reason to associate success in life with the acquisition of classical knowledge. According to Rudolph (1962), academic leaders of the denominational colleges could justify the existence of their colleges as a means for achieving upward mobility or increasing piety, but not by extolling the value of rigorous intellectual life. As a result, Rudolph (1962) noted, "the [denominational] colleges to a certain extent, incorporated a position of anti-intellectualism in their behavior" (p. 63). This attitude was very much in keeping with the frontier society's distaste for privilege and for all things associated with the aristocracy.

Americanization of the Second Great Wave of Immigrants

By the middle of the 19th century, those pioneers who had made a variety of internal improvements and advances in transportation and communication had greatly facilitated westward movement of people and the transport of bulk goods

to and from the Great Lakes region, the Ohio Valley, and the Heartland. In 1850, more than 1,200 steamboats, 9,000 miles of railroad tracks, and a series of canals which linked the country's major waterways were being operated to support merchant capitalism and embryonic industrial growth (Hacker, 1947). With the transmission of the first telegraph message in 1844 and the development of the federal postal service, those who advanced communication were closing the continental gap.

Representative of those who advocated a public policy of aggressive expansionism, John L. O'Sullivan, editor of the Democratic Review, viewed this expansionism as "the manifest design of Providence" (O'Sullivan, 1845/1947, p. 566). Fed by this concept of manifest destiny, the availability of cheap land, and dreams of a better life, many immigrants from Europe joined natives who also saw a chance to have a better life in the West. Together, in unprecedented numbers, they pushed the borders of the United States westward. From 1830 to 1850, five more states were added to the union: Arkansas (1836), Michigan (1837), Texas (1845), Iowa (1846), and Wisconsin (1848).

As miners, laborers, homesteaders, and ranchers established themselves and began to dot the Southwest, Midwest, and California with towns, other pioneer bands pushed the frontier east from California and further west into Utah and the Pacific Northwest. Like those in the first

migration of 1810-1830, some individuals within the second wave of pioneers saw a relationship between education and equality of opportunity and a narrowing of class distinctions. However, their appreciation for a common school education was usually based on a desire for economic and social advancement, and not for an inherent love of learning or a Jeffersonian desire to be educated citizens who were capable of participating in the political process.

Native southerners and northerners for quite different political reasons saw a common school education as important to these migrating foreigners and poor natives. Citizens from the North and South hoped to prepare these aliens for citizenship and to inculcate them with basic American ideals so that their large numbers would not have an unfavorable impact upon the American way of life which had already been established east of the Mississippi (Butts & Cremin, 1953). Probably citizens from each section hoped to "Americanize" these pioneers in accordance with their sectional aims.

Most of the western pioneers were too busily involved in being architects of their own fortunes to be as concerned about education as those who remained in the East where lifestyles were more stable and where colleges had been a part of the American landscape since 1636. Overall, the pioneers were not entirely unsympathetic to higher education as long as it was basically democratic in attitude and modern in outlook (Rudolph, 1962). The majority, however, were

against the colonial pattern of higher education because of its inherent encouragement of elitism, its emphasis on class distinctions, and its focus on a narrow, impractical course of study.

Henry Tappan (1851) described his perceptions of contemporary western attitudes about education a few months before taking over the presidency of University of Michigan:

> The commercial spirit of our country, and the many avenues of wealth which are opened before enterprise, create a distaste for study deeply inimical to education. The manufacturer, the merchant, the gold-digger, will not pause in their career to gain intellectual accomplishments. While gaining knowledge, they are losing the opportunities to gain money. (p. 64)

Tappan recognized that most common people were not interested in higher education as it existed in 1857. Unfortunately, his efforts at reform did little to win the pioneers' support for the University of Michigan. He proposed and implemented reform by supplementing Francis Wayland's kind of horizontal curricular expansion with a new kind of vertical curricular expansion which emphasized post-graduate study. His plan was to emulate the German university in which the development of originality and genius at the graduate level was stressed. Naturally, his approach was unpopular, and in 1863, he was forced to leave Michigan. His initial observations that the members of the second wave of immigrants were far more interested in being a part of the nation's manifest destiny than they were in participating in

education at any level had proved to be true. Only later would the leaders of higher education and the public applaud and support the imaginative ideas of Tappan.

Influx of Technology and Resulting Urbanization

While many pioneers were pushing the frontier westward, others were joining a significant movement from the farm into the cities everywhere but in the South. According to Morison (1965),

> during the 1840s the population of the United States went up 36 percent, but the growth of towns and cities of 8,000 or more people showed a phenomenal 90 percent increase. Measured by numbers, the urban movement was stronger than the westward immigration. (p. 483)

The growth of such cities as New York, Philadelphia, Cincinnati, Boston, St. Louis, Chicago, and New Orleans was similar to that of America's flourishing mercantile economy. Although life in America was still predominantly agrarian, because of a great water supply, a plentiful supply of materials, and the introduction of new technology, thousands of workers were attracted to urban areas by work in the textile and other mills. By 1850, a trend toward urbanization had been established. According to Hacker (1947), whereas only 5% of the people lived in urban areas in 1820, by 1850, 12.5 % lived in an urban area of 8,000 or more. Although citizens of the rapidly expanding northern towns benefited greatly as a result of urbanization, they

also were troubled by many problems associated with urbanization: crime, political corruption, shams, poverty, and exploitation of laborers, particularly children and vulnerable immigrants.

In spite of crowded schools, limited housing, slums, urban politicians who exploited immigrants for their votes, and merchants who used immigrants as a cheap labor force, urban dwellers enjoyed offsetting benefits which made urban life desirable. Municipal leaders began services, and they encouraged an interest in culture and the fine arts which slowly emerged. As humanitarian and democratic feelings intensified, citizens developed a commitment to social issues. Crusaders and reformers arose to combat intemperance, oppression of labor, mistreatment of the insane, excessive materialism, the rights of women and slaves, abuse of child labor, and ignorance (Craven, 1957).

In the northern urban centers, the benefits of a common school education were extended to children of all those who moved to the city from farms, as well as to the children of new immigrants. With the ability to speak, read, and write English and the acquisition of general knowledge taught in elementary school, new urban children learned to assimilate quickly into American urban life. Essentially, they were provided an avenue to upward social mobility. According to Butts and Cremin (1953), the members of the laboring class, who came to American cities with dreams of a social order

where privilege and aristocracy would not prevail, welcomed universal education. They saw education as the route to individual success and the best way to offset the effects of humble beginnings.

Students who were in the throes of urbanization and industrialization did not view the purposes and traditions of the ante-bellum university as accommodative of their needs. According to Francis Wayland (1850), President of Brown University, college was declining in enrollment, even in education-minded New England, in spite of scholarships and reduced tuition, an increased need for higher education, and a rapidly increasing potential college population. Indeed, New York City's two colleges, which served a population of over half a million, had a combined enrollment of only 247 in 1846, and the number of students in Harvard's graduating class did not exceed 100 until after 1860 (Rudolph, 1962, p. 219). Concern for curriculum reform in order to reverse low enrollment prompted Wayland (1850) to observe to the Brown Corporation:

> Our colleges are not filled because we do not furnish the education desired by the people. We have constructed these upon the idea that they are to be schools of preparation for the professions. Our customers, therefore come from the smallest class of society; and the importance of education which we furnish is not so universally acknowledged as formerly, even by this class. We have produced an article for which the demand is diminishing. We sell it at less than cost, and the deficiency is made up by charity. We give it away, and still the

> demand diminishes. Is it not time to inquire whether we cannot furnish an article for which the demand will be at least somewhat more remunerative? (p. 34)

Wayland was able to convince the Brown Corporation to adopt an innovative elective system which would be more utilitarian and appeal to mass culture. Although he was not able to quickly solve the complex problems facing his college in 1850, future curriculum reformers gave Wayland credit for influencing their ideas and ultimately helping to remake the post-bellum college.

Sectional Differences between 1850 and the Civil War

Overriding all other problems in the middle of the 19th century, the problem of sectional differences, though temporarily diffused by the Missouri Compromise of 1820, continued to gain momentum throughout the first half of the century. As the states west of the Mississippi emerged as a political force in the first half of the century, western leaders found themselves in a critical pivotal position in the power struggle between the North and the South. While the West had originally been more aligned with southern agrarian interests, according to Hacker (1947), "as mercantile, transportation, and industrial interests began to appear in the West, New York, and New England capital were stronger ties between Northeast and West than were those of blood connecting South and West" (p. 46).

Southern political strategists saw an inevitable imbalance of power looming over the horizon and responded defensively. To offset the expansion of more free states in the West, southern politicians advanced programs which demanded slavery in the territories. They concentrated on rallying support among their own ranks with cries for states rights, secession, reduced tariffs, free trade, and relaxation of the limitations on African slave trade. They fought western demands for any federally financed public works, free land, and improved transportation because leaders of western interests were not supporting economic measures which would equally benefit the South. At the same time, they also alienated northern interests by repudiating Calvinistic moral assumptions about slavery and undeserved wealth (Craven, 1959) and withheld legislative support for socio-economic policies favorable to cities, factories, and railroads.

Even attempts to pass legislation like Justin Morrill's Land Grant College Act, which would have aided all states were also rejected by the recalcitrant South. Most southern legislators refused to endorse this landmark legislation which was introduced in 1857 because they "were unwilling to strengthen the artisan and laboring classes of the North, and their noblesse oblige to the vast majority of hard-working white southern farmers did not extend to education" (Rudolph, 1962, p. 250). Philosophically, many viewed education as

private and philanthropic in nature, and any proposed use of tax money for this or similar purposes raised serious constitutional questions.

In contrast to the North which had such giants as Whitman (who published Leaves of Grass in 1855), Thoreau (who published Civil Disobedience in 1849 and Walden in 1854), and Hawthorne (who published The Scarlet Letter in 1850), the intellectual community of the South in the 1850s was for the most part conspicuously barren. George Fitzhugh (1857/1947) defended slavery on the level of social theory, but Hinton Helper (1860/1947) denounced slavery as an economic system which crushed poor non-slave owning yeoman white farmers. Helper had to publish his own book, and, as a result of reading it, "men were lynched and at least one Southern state made possession or distribution of it a felony" (Hacker, 1947, p. 542.). Those who were opposed to slavery and were outspoken about it, like University of North Carolina's Professor Benjamin Sherwood Hedrick, found their academic freedom threatened and their jobs on the line (Hamilton, 1910). Even at the more liberal South Carolina College, Francis Lieber, the eminent political philosopher, did not openly debate or publish books or articles examining either abolitionist or proslavery moral questions and arguments because his personal sentiments leaned more toward nationalism and civil liberties. By exposing any liberal

attitudes, he could have placed his academic security in jeopardy (Hollis, 1957).

While the more pluralistic northern and western colleges of the 1850s were by no means ideal centers for open discussion of pressing national social issues, they were much more tolerant of philosophical and political diversity than the southern colleges. After mid-century, southern college faculty members tended to close ranks, and, according to Hofstadter and Metzger (1955), southerners were overcome by a "severe general intellectual paralysis" (p. 259). Commenting on the pervasive influence slavery had upon intellectual life in the South, Hofstadter and Metzger (1955) concluded that

> the entire intellectual energies of the section, so far as public matters were concerned, were given to the moral justification of slavery and its defense in the political arena. Intellectual and spiritual considerations that interfered with this defense had somehow to be shoved out of view. Intolerance and repression with widespread ramifications in almost every area of thought developed on the base of the proslavery argument. It was the tragedy of the South that while blacks were enslaved by the whites, the whites were enslaved by slavery. (p. 256)

According to Craven (1959), "the years from 1844 to 1850, which ultimately produced the Wilmot Proviso and the Compromise of 1850, form something of a watershed in the history of the democratic process in the United States" (p. 69-70). In spite of differences in values, lifestyles, and interests, people from rival sections had always tolerated these differences and had been able to work them out through

discussion, compromise, and moderation. However, in 1850 a breakdown of the democratic process began to occur (Craven, 1957). The actual catalyst which brought the controversy to a head in 1850 was California's application for statehood as a free state. The deceptive tranquility brought about by the Missouri Compromise in 1820 dissolved as southern political leaders saw themselves socially and politically becoming a "permanent minority" (Craven, 1959). The Compromise of 1850 and the Kansas-Nebraska Act of 1854 were legislative attempts on the part of skillful politicians to overcome sectional rivalries and to keep dialogue open and the democratic process alive. But in effect, the product of these laws was an intensifying uneasiness and a crystallization of the opinions of extremists on both sides.

In the North, abolitionists accelerated their activity, and leaders of a coalition of western and northern political forces created the Republican Party. In their platform, the members of the new party denounced slavery, advocated free soil, and supported modernization. In the South, extremists threatened reprisals if the South did not receive equality in national affairs. Wary moderates felt alienated and grew progressively more worried about the prospect of a socio-economic revolution when and if the newly-organized Republican Party came into power.

Attitudes in the Northwest at mid-century generally were not as extreme as in the North or South, but unified by self-

interest and nationalism, the people of this crucial area helped to determine the direction the nation would take in the 1850s. In the Great Lakes region of the Northwest in 1850, which had a population of over a half million transplanted New Englanders and New Yorkers (Craven, 1957), the people were primarily abolitionists as their New England relatives had been. On the other hand, residents of the Ohio Valley area, which early had been settled by Englishmen and Germans who were later joined by the Irish, German Catholics, and Lutherans, were bitterly opposed to the moral assumptions and crusading of the Great Lakes New-England element. These Ohio Valley residents were not averse to having friendly relations with Southerners while conducting trade with both the South and the Northeast. According to Craven (1957), the southern counties of the Old Northwest "valued Southern markets, but not necessarily Southern institutions and programs" (p. 318). Foremost, like other believers in manifest destiny, they mostly thought of their own immediate welfare. In the end, they were influenced by the driving forces of progress which were manifest in all of the country except the lower South. They too joined forces with the abolitionists of the Lakes region to demand the preservation of the union.

Senator Stephen A. Douglas, the Ohio Valley's most articulate spokesman, denounced both slavery and abolition as extreme courses. He knew that the North and the South were

progressing, but along different paths, and he felt that realistic hopes for continued unity by 1850 lay in compromise that would allow the people of two distinct civilizations not only to coexist but also to progress. He pushed for compromise in 1850 and introduced the Kansas-Nebraska Act of 1854 so that partisans who were filled with sectional self-interest and emotionalism would not divide the nation or deter any part from the achievement of its unique manifest destiny. Of course, the ambitious politician hoped that through implementation of this compromise, he also could bring money, power, and political influence to himself and his area (Hacker, 1947; Morison, 1965). Nevertheless, in an apparent spirit of compromise in 1854, Douglas again tried to reconcile the two sides when the leaders of Kansas and Nebraska requested statehood. He proposed a policy whereby the Kansas-Nebraska territory could enter the union under the policy of popular sovereignty. While the Kansas-Nebraska territory did not look ripe for slavery and cotton production, to citizens of the South the policy of territorial self-determination devoid of federal intervention was at least palatable.

Unfortunately, Douglas's political enemies twisted his support of popular sovereignty as a means of insuring growth and expansion in the West, while at the same time not alienating the South, into a pro-slavery attitude. This rising young politician aroused the fury of abolitionists and

the honor of loyal southerners. The southern conservatives and Douglas's Illinois constituents from the Ohio Valley generally gave him support, but the abolitionists of the Great Lakes area generally joined the forces of the northeastern abolitionists. Foremost, citizens from all sections fought vigorously for equal voices in the government and for policies that would, in their view, maintain economic and political equality of opportunity for all citizens and safeguard their way of life.

Douglas's Kansas-Nebraska Act was instrumental in bringing about a coalition of western and northern political forces. Ironically, the spokesman for this coalition became not Douglas, the former "darling" of Northern Democrats, but Abraham Lincoln, Douglas's political rival. Through his attempts at compromise, Douglas had alienated enough northern abolitionists, and through his failure to define popular sovereignty as slavery in Kansas, he had alienated enough southern conservatives ultimately to cost him his bid for the presidency in 1860. Over the period between 1850 and 1860, Douglas's greatest fear had become reality. Slavery had become a national crisis. Craven (1957) made the following comment on this change in attitudes:

> Up to this point, the abolitionists, fighting slavery per se, had been generally viewed as crackpots. They had not achieved respectability. The great masses of common man, though disapproving of slavery on both practical and moral grounds, had no great interest in the institution as it existed in the South,

> nor any grave apprehensions regarding its influences in the nation. . . . Gradually, however, this attitude had been undergoing change. The Nebraska bill completed its transformation. . . . Slavery was not just a personal sin, it was a barrier to progress. It was impeding Manifest Destiny. It held back the white man of the North and interfered with his "God-intended" well being. (pp. 339-340)

The people of the Northwest joined those of the Northeast in viewing the South as uneducated, economically backward, and socially and morally bankrupt. The strategists of the fragmented Democratic Party were unable to prevent the members of this new coalition from "catapulting" Republican Abraham Lincoln into the White House in 1860 with only 40 % of the popular vote. The task of uniting a nation of such divergent interests was next to impossible. In spite of increasing tensions, Lincoln patiently worked to heal the sectional divisiveness which slavery had come to represent. After the South's secession, Lincoln was forced ultimately to use military action to respond to this threat to national unity.

For more than a decade, the creative energies and financial and human resources of the nation were focused on the Civil War and its aftermath. Many young men of college age fought on the battlefield, while many philosophers and academicians fought on the intellectual front. As a result, the period between 1850 and 1870 was not characterized by the great educational advances that were taking place in the

research laboratories of German universities. For the most part, educational advances and reforms were delayed until the last quarter of the 19th century when the American academicians were forced to finally acknowledge the "professional 'respectability' and social indispensability of the engineer, the natural scientist, and the industrial technician" (Brubacher & Rudy, 1976, p. 111).

The Educational Environment in the Last Half of the 19th Century

Given the political turmoil of the country in the years between 1850 and the Civil War, officials at American colleges could hardly have isolated themselves enough to have been unaffected by a nation in enormous transition. College critics, benefactors, faculty members, academic leaders, and students were products of a generation caught up in the conflicting socio-economic and political forces. As such, the members of these influential groups held changing societal values and antagonistic viewpoints which in turn influenced their beliefs about the purpose and goals of education. Naturally, their respective sectional views about what constituted the right outlook on life, the most appropriate social order, and the best lifestyle were influential in their determination of educational goals. Specifically, many held contrasting views of the nation's manifest destiny and the best method for financing it and the appropriate educational preparation needed for future

students faced with the demands of a modernizing society. Still others defined equality and equality of opportunity with respect to education in very different ways. While most thought of themselves as strong proponents of democratic ideals, how these ideals should be applied to educational practice was also an issue of considerable debate.

The Demand for Educational Reform

Around 1850, educational reformers began to raise their voices in protest to press for changes which would make higher education more compatible with 19th-century democratic ideals, geographic mobility, and the urban and industrial needs of the expanding nation. This reform was centered on the superficial, out-dated curriculum and the attendant paternalistic system of discipline. The authoritarian system of discipline, in which colleges officials viewed their students as depraved and undisciplined and in need of a paternalistic collegiate style of living to control their behavior, came under fire because it was not in keeping with democratic ideas about the dignity of the individual or in step with more humanitarian attitudes about the nature of man. In short, prompted by the German example of lehnfreiheit, the freedom to teach, and lernfreiheit, the freedom to learn, many critics felt that because universities were not mere extensions of secondary schools, all members of the university community should begin moving toward the idea

of a "real university" where students were treated as adults who were free to think, study, and do advanced research.

According to Brubacher and Rudy (1976), even before 1850 such early reformers as Nott at Union, Wayland at Brown, Dwight at Yale, and Hopkins at Williams had moderated the disciplinary policies at their colleges. The policies of these early reformers were more democratic in philosophy and their disciplinary systems were not reflective of the idea that college students were depraved and in need of constant moral supervision and control. According to Rudolph (1962), by 1850 most colleges had moved away from an excessively rigorous system of discipline. Instead, college officials increasingly relied upon students' self discipline and inner goodness, instead of attempting to frustrate the efforts of students to circumvent traditional out-moded codes of conduct. In attitude, progressive academic leaders were similar to Harvard's President Charles Eliot (1869) who found students to be mature, internally motivated individuals who knew how to conduct themselves and how to select a curriculum best suited to their "natural preferences and inborn aptitudes" (p. 11). Moreover, Eliot, with his introduction of progressive disciplinary attitudes, helped to pave the way for curriculum changes which he and other education reformers vigorously sought in order to transform the American college into a university. If students generally required less direct supervision, faculty members could devote the

additional time to the research, scholarship, and preparation of class materials necessary to accommodate the horizontal and vertical extension of the curriculum which innovators had initiated after 1850 and had nurtured into "full bloom" after the Civil War.

Of course, Eliot and the reformers who preceded him in the 1850s did have their critics, especially those academics of a more evangelical mind. According to Brubacher and Rudy (1976), these critics saw liberal reforms "as making for impiety, secularism, and excessive scientism" and "as a menace to all the values they held dear" (p. 113). Certainly, those who shared these attitudes lent their support to the small private denominational colleges which had proliferated in order to safeguard religion and morality. Nevertheless, in many colleges, the wheels of the academic revolution were turned. Students became the beneficiaries of the academic leaders' attempts either to compromise with or accommodate voluntarily a more utilitarian public which was concerned with the technological needs of business and agriculture and the practical problems of "real life" (Veysey, 1965).

The Civil War was the primary catalyst which directed the attention of the American university to curricular patterns which were elite, outdated, and inappropriate to meet the nation's industrial needs. However, the intellectual leaders in the 19th-century German universities also made a

significant impact on American higher education. While Americans had been in the throes of social upheaval and war, the Germans had been busy "pushing back the frontiers of knowledge" (Brubacher & Rudy, 1976, p. 175).

Development of the Graduate School and Growth of the Publicly Supported University

Before 1876, in order to receive advanced training beyond the baccalaureate degree, American scholars had to study in Germany, England, France, or other European countries, for native higher education had focused only on undergraduate instruction. Such pioneers as George Bancroft, Edward Everett, Joseph Green Cogswell, and George Ticknor had gone to Germany and had brought back to America in the first quarter of the century an appreciation for German intellectual attitudes about scholarly research, freedom to learn, and freedom to teach (Thwing, 1906). Students who migrated to Germany and other European countries had helped to focus attention on the inadequacy of the American college curriculum. Throughout the first half of the century, the number of students who traveled to Germany increased as German universities became pre-eminent in the world. As respected scholars returned to America, they brought with them inspiring stories of the German emphasis on abstract research, scientific advancement, and new teaching techniques which cast aside recitation, encouraged individual thought and experimentation, and treated students as adults. Soon,

future American academic leaders were filled with discontent and a desire for reform.

By the 1850s and 1860s, officials at almost all colleges were concerned with declining enrollment, and strong academic leaders were looking for innovative approaches to address this crucial problem. Reformers Francis Wayland at Brown, Henry Tappan at the University of Michigan, and F. A. P. Barnard at Columbia College in their own ways emulated foreign ideas. Wayland (1850) argued for an expanded, more flexible curriculum which could accommodate more people and provide for the scientific and practical needs of society. Tappan (1851/1961) called for a pyramidal state educational system with a German-style university at its apex,

> wherein libraries, cabinets, apparatus, and professors, provision is made for studying every branch of knowledge in full, for carrying forward all scientific investigation; where study may be extended without limit, where the mind may be cultivated according to its wants, and where, in the lofty enthusiasm of growing knowledge and ripening scholarship, the bauble of an academic diploma is forgotten. (p. 493)

Mindful of the German university ideal which gave students more freedom and responsibility for their learning, Barnard (1855/1961) also sought reform by calling for all colleges officials to abandon entirely the cloister system and with it the pretentious system of watching over the conduct and protecting the morals of the student (p. 511).

Leaders at prominent eastern universities founded special scientific schools to address the scientific and technological needs of the industrial age into which Americans were being thrust. In 1847 Harvard's leaders established the Lawrence Scientific School and, in the same year, their Yale counterparts founded the Sheffield Scientific School. Later, separate scientific schools also were founded in 1851 at Dartmouth's Chandler School of Science and Art, and in 1861 at the Massachusetts Institute of Technology. These scientific schools were founded in part because comparison to the German universities made the inadequacy of American curriculum in the sciences more obvious. While they were an improvement in the curriculum, they were not a solution to many of the higher education's inadequacies.

According to Storr (1953), by 1861 nearly all academic leaders were driven to admit that the American college, even with some reforms, could not compete with the European universities, even though some bore the name. Most acknowledged that the college needed augmenting or transforming, but many could not clearly envision how this should be accomplished or what the ideal university really was. During this period of unrest and reform, however, a few visionary leaders began to form ideas about what the American university should be. According to Veysey (1965), from the period 1865 to 1890, three well-defined conceptions of an

American university emerged from this desire for academic reform. These conceptions were centered "in the aim of practical public service, in the goal of abstract research on what was believed to be the pure German model, and the attempt to diffuse standards of cultivated taste" (Veysey, 1965, p. 12). These three conceptions, according to Veysey (1965), were closely linked, respectively, to Francis Bacon's utilitarian enthusiasm, the German university scholars' enthusiasm for research, and the British public's enthusiasm for culture--all cast against an intellectual and cultural backdrop which included classical civilization, the Renaissance, German Romanticism, and the European Enlightenment (pp. 12-13).

The first of these conceptions was given direct support by the Morrill Act of 1862. In this landmark legislation, each state was offered land or equivalent scrip if no land was available for the support of higher education. The authors of the act required that funds from the sale of lands or scrip were to be used by the states for

> the endowment, support, and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts. (Morrill Act, 1862, Section 304)

In each state at least one institution was designated as a land-grant institution. In some states, the existing state university was enlarged to carry out this practical function.

In other states where no public university existed, the first publicly-supported universities came into existence to serve the public's practical needs in education. In some states in the Northeast, where no state university had been established, a private institution was granted the land-grant function in conjunction with its private function. Much of the success of Cornell in New York was attributable to this kind of arrangement. According to Rudolph (1962), "in the land-grant institution, the American people achieved popular higher education for the first time" (p. 265). With both public control and public support, the land-grant colleges and state universities were a buttress to the practical public service function of the university. They were not strongholds of theory which upheld learning for learning's sake. Essentially, they were "temple[s] of applied science" (Rudolph, 1962, p. 265) through which the technological and vocational needs of the expanding nation could be addressed. Moreover, land-grant colleges became the vehicle through which the progeny of the earlier Jacksonian democrats were able to realize economic and social mobility while upholding both traditional rural values and the ideal of the self-made man (Rudolph, 1962, p. 265).

At the same time that the land-grant colleges were developing, the second conception of the university was emerging. Daniel Coit Gilman, who had studied in Europe, was the leader of this movement. A former Yale graduate who had

helped to reorganize Yale's Sheffield Scientific School, Gilman provided vision and genius in the pioneering of America's first graduate school, Johns Hopkins, where the spirit of inquiry was paramount. Gilman was heralded by G. Stanley Hall (1923/1961) as a man "who never entered the mad race for dollars and students" and as one who made "intellectual creativeness . . . the real standard and test of any system of higher education" (p. 651).

At Johns Hopkins, Gilman planned to supplement existing colleges by creating a wholly independent graduate school where an elite group of gifted serious students would stimulate, challenge, and conduct research under the best faculty he could find in the world (Gilman, 1906/1961). With the opening of Johns Hopkins in 1876, Gilman brought together a faculty who had trained in Germany and England and whose intellectual zeal and painstaking, objective search for truth reflected the best of both German research standards and English empirical philosophy, tempered somewhat by an American emphasis on social responsibility (Veysey, 1965). Gilman did not duplicate the German university exactly. Rather, while he retained German scholarly research and methodology, he gave his support to research that advanced the frontiers of knowledge and at the same time satisfied some of the basic needs present in American society. Both faculty and students were encouraged to search for truth, unfettered by narrow intellectual restraints, inappropriate

methodology, and paternalistic controls. Americans did not initially accept Gilman's elite educational institution as warmly as they did the more egalitarian land-grant institutions that were developing simultaneously. Fortunately, Johns Hopkins was funded by private philanthropy and was able to survive.

While scholars at Johns Hopkins did not enjoy immediate public approval, they were quite influential in stimulating change in other American colleges. Fifteen other graduate schools or departments were founded by the turn of the 20th century (Hofstadter & Metzger, 1955). Experimental laboratories, scholarly lectures, weekly seminars, and large research libraries, which were all based on the German model that Gilman had adapted for use at Johns Hopkins, quickly became an integral part of graduate education. Gradually, undergraduate faculty members also adopted some of the methods used at the graduate level. John D. Rockefeller at the University of Chicago, the Leland Stanfords at Stanford University, and Jonas Gilman Clark at Clark University further helped to spread the idea of the graduate research university across America by contributing substantial amounts of money.

By 1896, 60 American universities had three or more faculty members with degrees from Johns Hopkins (Brubacher & Rudy, 1976). Gilman's products were responsible for spreading the new idea of the university with missionary

zeal. By 1900, the pattern Gilman had established at Johns Hopkins also had helped to bring about the reorganization of such established provincial liberal arts colleges as Harvard, Yale, Princeton, and Columbia into real universities where a professional approach to scholarship was critical. Such noted state universities as Michigan, Minnesota, and Wisconsin, also had been infused with the Hopkins' "spirit of science and scholarly inquiry" (Rudolph, 1962, p. 275).

Essentially, such innovators as Gilman had helped to radically change the face of American education in the last half of the 19th century. The reform of the 1850s had ushered in an era of educational change which culminated after the Civil War in the expansion of the American college into the American university. In this new era, the advocates of the collegiate tradition, with its emphasis on revealed religious truth, classical curriculum, and a paternalistic system of controls, were forced to undergo radical change. As converts to the university movement, they instead placed the emphasis on the search for scientific truth, an expanded curriculum providing students more choices, and an atmosphere in which students were encouraged to exercise more self government. Moreover, the leaders of the new university helped create an environment in which students were encouraged to think independently, to judge more critically, and to act more maturely.

The third conception of the university was focused on diffusion of liberal culture. Gilman, Andrew White at Cornell, and William Rainey Harper at the University of Chicago all saw diffusion of advanced knowledge as a noble venture in which the members of the university would share the fruits of advanced research with the people through publication or extension programs. However, diffusion of scientific and technological research or utilitarian knowledge was not what the advocates of liberal culture valued. Academicians with this view of the university upheld the study of literature, history, philosophy, and religion as the pathway to knowledge. In this conception, the development of the whole man as a thinker was the primary goal of the university. The utilitarian and scientific radicals were the common enemies of the academic philosophers and men of letters who espoused this conception of the university (Veysey, 1965). Such notables as Charles Eliot Norton, James Russell Lowell, and A. Lawrence Lowell (Harvard), John Bascom (Williams), Woodrow Wilson (Princeton), and Alexander Meiklejohn (Amherst) represented this view of liberal culture and education. Eventually, this view also was prevalent at smaller institutions such as Princeton, Yale, Amherst, and finally at Harvard after the Eliot era.

Out of all this concern for utilitarianism, research, and liberal culture, no truly coherent purpose for the American

university emerged for any sustained period of time other than the few short years when Gilman was beginning the university movement. Those forces which were bent to the utilitarian demands of the public contrasted with other forces which were steadfast in their view that the university was an institution whose main purpose was the search for truth. Perhaps because of the equal strength of the views held by these competing groups, no dynamic educational leader and no strong educational group emerged as a force strong enough to unify higher education behind a single purpose. Even the emergence of the American Association of Universities at the close of this period of rapid educational change in 1900 did not result in unification of all factions within higher education. The association did, however, become a forum for administrative discussion and debate of the many contrasting views and their implications. Also, in order to exert a voice in all this debate and to protect their unique interests, university professors united in 1915 and founded the American Association of University Professors. Unfortunately, neither of these groups was able to bring real unity to higher education.

Student Reaction to Educational Authority

As college officials in the second half of the 19th century began to reconsider their roles and to consider students themselves as self-reliant young adults, students

began to develop different attitudes, behaviors, and expectations. The rise of social fraternities and sororities, clubs, intercollegiate athletics, theatrical groups, debating societies, and the decline of the dormitory system were tangible evidence of the transitions that student life was undergoing before the Civil War, but which radically changed academic patterns after the war (Brubacher & Rudy, 1976; Veysey, 1965). In keeping with expanding America's emphasis on business and industrialization, and with the common citizen's ambivalence toward university culture and learning, undergraduates were becoming less interested in learning for its own sake and increasingly more interested in extracurricular activities and in furthering their social ambitions. This change in undergraduate mentality was in sharp contrast to the serious attitude of the colonial classical scholars who had spent long hours in supervised study or the graduate students who were devoting themselves to the search for truth. Veysey (1965) observed that this change in student outlook was so great that by the "end of the 19th century, college meant good times, pleasant friendships, and underneath it all, the expectation of life-long prestige resulting from the degree" (p. 269).

Fueled by the energy of the early 19th century and by ideas of equality and democracy, many students began to rebel against the authoritarian constraints of the traditional college and to test the limits of their freedom. At almost

all antebellum colleges, students had resorted to collective action in the form of riots as a means of expressing their dissatisfaction with different aspects of the student-university relationship (Brubacher & Rudy, 1976). As the Harvard riot of 1834 had vividly illustrated, even three decades into the 19th century, the most antebellum students still viewed intervention in university affairs by the courts, civil authorities, or other outside sources as an unconscionable infringement of traditional university rights and privileges. However, as the political and socio-economic complexion of the American college student population began to change and the benefits of in loco parentis began to be perceived as burdensome and intolerable limitations, student began to think differently. The protection once afforded students as wards of the colleges were not valued as they once had been under the guild systems transplanted to American in the first half of the 17th century.

By the middle of the 19th century, the changing students were less willing to acquiesce to the paternalistic attitudes or arbitrary treatment of university officials or to show deference to academic tradition. While the University of Virginia and Amherst had been exceptions in attempting to grant students greater self-regulation in the early part of the century, most college officials had viewed student riots as proof that students really could not handle freedom; hence, they refused to grant students more freedom. Toward

mid-century, more students began to agitate for student government to represent and regulate them in place of the university itself. This movement progressed little before mid-century, but, according to Rudolph (1962), after the Civil War, formal recognition of student responsibility for student discipline and student regulation in the form of student councils, interfraternity councils, and various other forms of student advocacy was granted to students and became widespread during the Progressive Era after the turn of the century.

In addition to demanding student self-government, some disgruntled students also began to violate academic custom, appealing to outside authorities for help in resolving their disagreements with college authorities. According to Jennings (1980), college students have been taking their contract disputes with their colleges to the courts with some regularity since the late 19th century.

The Evolution of Student Demands for Redress

The tendency of American students to take their disputes to the courts certainly was not a spontaneous happening. Under the early pattern of third-party beneficiary contracts (Shoben, 1970), disputes between students and colleges had been resolved at the institutional level at the discretion of the paternalistic college. According to Shoben (1970), under this system,

> an agreement was entered into between an institution and a student's parents for the benefit of the latter's child. Because the youngster was not himself a party to the contract, and because he was essentially sent to college in order to enjoy the special assets of an elite, he was presumed to have little or nothing to say about the processes by which his benefits were to accrue to him. (p. 558)

This procedure for handling disputes was in keeping with academic tradition and privileges established under the guild system in the Middle Ages. During the Middle Ages, European university students had appreciated the benefit of having their disputes resolved by the university chancellor's court, for this court had been more sympathetic to the student's plight than had been the civil court. Over time, as relations between universities and society at large improved, this arrangement did not continue to be perceived as the great privilege it once had been. As the jurisdiction of the university system over American students became less advantageous to students, they sought other avenues of redress for what they considered egregious injustices on the part of the college or university.

A brief review of the resolution of four colonial cases handled at the institutional level provides a backdrop against which one can better view the development of this legal relationship as it unfolded beginning in the middle of the 19th century. These early cases are exemplary of the inadequate recourse available to students in the colonial college. They help to explain why subsequent students felt a

growing need for substantial change in the manner in which their cases were handled. While traditional academic leaders in the colonial era shunned any outside intervention in university internal affairs and deferential courts supported this custom, students in these cases could likely have benefited from a review of their cases in the civil courts. Certainly, not all institutional disputes were so disadvantageous to students; however, these cases at Harvard and Yale provide an insight into why students eventually came to have a change of attitude about having their cases determined solely at the discretion of the university.

Early Cases Determined at the Institutional Level

Violations of the agreements between the parent, representing the student, and the university began in 1639 with Harvard's first leader, Nathaniel Eaton. Eaton was quickly fired, and students were sent home and left without instruction for more than a year when the college's board of trustees discovered that Eaton had abused his in loco parentis authority. According to Morison (1935), students reported that Eaton had excessively beaten them and had severely beaten the assistant master. Eaton's wife confessed that the students, whose parents had formed an implied contract with the college to provide room and board, had been fed no beef, a daily supply of sour or inadequate bread, and no beer for days at a time. Later, the college trustees also

alleged that Eaton had absconded with college funds. Certainly, he had not satisfactorily carried out the terms of the student's admissions agreements; however, because of contemporary socio-legal considerations, neither parents nor students even considered suing for breach of contract.

According to Jonathan Edwards (1817/1949), Yale's conservative doctrinaire president, Thomas Clap, citing a 1741 rule forbidding students to refer to college officials as carnal or unchristian, unjustly expelled David Brainerd. In this instance, Brainerd refused to confess publicly for a casual comment made in a private conversation with a personal friend in which he flippantly compared his tutor's grace to the chair he was leaning on. Clap expelled Brainerd because he was guilty of violating school rules and refused to humble himself and confess publicly. Clap staunchly refused to readmit him in spite of an apology later proffered by Brainerd and serious protests by Edwards and other leading citizens who vouched for Brainerd's high moral character. In this case, the reasonableness of Clap's exercise of discretion in severing the college's relationship with the student also was not tested in the legal arena.

According to a report issued in 1744 by Clap (1818/1972), John and Ebenezer Cleaveland were expelled for attending Separatist Church services in the company of their parents while they were on vacation from college. The brothers refused to confess any wrongdoing when they returned to

school, so Clap expelled them. Their refusal to confess was deemed a validation of Clap's contention that they had absorbed too many corrupt New Light religious principles and beliefs while attending the liberalized Separatist Church. Clap's decision was widely criticized and questioned, as was the extent of his in loco parentis authority, but the college's board supported his decision. Fortunately, the Cleaveland brothers were retroactively awarded their degrees after Clap had left and those who practiced greater religious tolerance were once again in power (Dexter, 1896). In this instance, Clap's discretion again was not challenged in court.

While a 20th-century court might have upheld Clap's exercise of discretion in the Brainerd case as reasonable, the Cleavelands possibly could have succeeded in convincing the courts that Clap had exceeded his in loco parentis authority. A 20th-century court likely would not have considered the monitoring of religious activity during vacation under the supervision of parents outside of the school as an implied contract condition mutually agreed upon by the parents. The court's decision with respect to a private school's expulsion of the Cleaveland brothers would likely have turned on reasonableness.

Although none of the previously mentioned students resorted to outside agencies to thwart the excessive authoritarianism and questionable exercise of discretion,

another student did. According to Trumbull (1818/1972), a senior was expelled and denied his degree by Clap because he bought a copy of one of John Locke's letters on religious tolerance. Angered over this affront to his religious freedom, the senior threatened to take his case to the king in council. Instead of facing this, the college authorities granted the student his degree because they feared retribution on the part of higher authority. Here again, had this case been litigated, the arbitrariness of the action might have caused the courts to order the college to readmit the student.

The First Court Case Using Contractual Principles

Blackwell (1961) and Jennings (1980) viewed a tuition dispute tried in the Vermont Supreme Court, Middlebury College v. Chandler, as "the first American case on the legal status of a college education" (Blackwell, 1961, p. 102). This case occurred within the generation in which many average citizens were viewing educational institutions with skepticism and when some individuals were turning to the courts to help them resolve other kinds of disputes involving breach of contract. Eventually, parents and their college students, who heretofore would not have turned to the courts, began to look outside institutional mechanisms for redress when institutional authorities supported decisions like those previously described at Yale and Harvard.

In Middlebury College v. Chandler (1844), both parties to the suit argued their cases based on the assumption that contract doctrine was controlling, and the court used contractual principles to determine the case. The court ruled that Lyman Chandler was not liable for payment of tuition and expenses incurred during his junior year when he was still a minor who under contract law had limited capacity to contract. Chandler's father had died after his freshman year, and the college had been informed of this fact. His father's estate had paid tuition for the subsequent year, but the estate ran out of money and did not pay for the junior year, so the college tried to collect from young Chandler. The court ruled that Chandler, who was 15 at the time of his admission, was not liable for the junior year's tuition because, according to the customary common law principles of contract law, a minor could, at his pleasure repudiate all contracts except those that were necessary, given his station in society. The court held that

> a good common school education at the least is now fully recognized as one of the necessaries for an infant. . . . But it is obvious that the more extensive attainments in literature and science must be viewed in a light somewhat different. . . . The mass of our citizens pass through life without them. . . . We therefore consider that such an education should not be ranked among those necessaries for which he could, as an infant, render himself absolutely liable by contract. (pp. 683, 686)

Hence, since the contract was not for goods or a service which the courts had determined were necessary in a legal sense, the minor student was permitted to disaffirm the contract and not pay the tuition.

This case is important in that the court acknowledged the existence of a contractual relationship between the student and the college or university. Attorneys for both parties viewed the relationship as contractual in nature, and the judge turned to basic contractual principles to resolve the case. While subsequent courts and legal authorities have analyzed and defined the legal relationship between students and their colleges or universities under several different doctrines--in loco parentis, privilege, constitutional, trust, fiduciary, associational, unitary (Michael, 1970-71)--the court in 1844 established that this relationship could be construed as contractual or contractual in nature.

Definition and Terms of the Contract in Early and Mid-19th Century Law

Suits for breach of contract in the business world were common practice in American courts in 1844, the year when Middlebury College v. Chandler was litigated. The standard definition and elements of the contract basically have not changed. Powell (1825) defined a contract as "a transaction in which each party comes under an obligation to the other, and each reciprocally, acquires a right to what is promised by the other" (p. 4). He added the following explanation:

"The ingredients requisite to form a contract are, First, Parties. Secondly Consent. Thirdly, An obligation to be constituted or dissolved" (p. 4).

Concerning the ability to enforce the contract at law or in equity, Powell (1825) observed that

> since words are frequently spoken by men unadvisedly and without due deliberation, the law will not bind a man to an executory contract entered into by words only, if it be not founded on a good or valuable consideration. . . . So if one bring of me a horse, by other thing for money, and no money be paid, nor ernest given, nor day set for payment, nor the thing delivered, here no action lies for the money or the thing sold, but the owner may sell it to another if he will; for such promises or contracts are deemed nuda pacta, there being no consideration or cause for them, but the covenants themselves, which will not yield an action. (p. 299)

Stated slightly differently, a mid-century authority, Chitty (1848), defined contract in a manner quite like that of Corbin (1952) and other contemporary, standard law treatises on contract:

> A contract or agreement not under seal may be defined, or described to be the mutual assent of two or more persons, competent to contract, founded on a sufficient and legal motive, inducement, or consideration to perform some legal act, or omit to do anything, the performance whereof is not enjoined by law. From which definition it appears that to constitute a sufficient agreement, there must be: 1st. The reciprocal or mutual assent of two or more persons competent to contract;--2ndly. A good and valid consideration;--3rdly. A thing to be done which is not forbidden, or a matter to be omitted, the performance of which is enjoined by law. (pp. 8-9)

Further expanding upon his definition of contract, Chitty (1848) cited Blackstone's distinction between expressed and implied contracts as authoritative:

> "Express contracts", says Blackstone, "are where the terms of the agreement are openly uttered and avowed at the time of the making. . . . Implied are such as reason and justice dictate; and which, therefore, the law presumes that every man undertakes to perform." (p. 18)

The same conditions and requirements which applied to standard commercial contracts in the middle of the 19th century applied to the contractual relationship between the student and the university. In order for the contract of enrollment to be enforceable in a court of law, it had to include the following elements: competent parties, offer, acceptance, valid subject matter, consideration, mutuality of agreement, and mutuality of obligation (Chitty, 1848). As the body of case law developed at the state court level after 1844, the essential conditions and requirements of the contract as they applied to the student/university relationship were clarified.

Educational Contract Terms in 19th-Century Case Law

The first statement by a court about competent parties in a contract between the student and a university occurred in Middlebury College v. Chandler (1844), where the court followed traditional thinking. The court ruled that while the institution could enter into a contract with a minor

(infant), the contract was not enforceable unless the service provided was necessary. This court defined a competent party in the traditional manner later described by Chitty (1848), who limited a competent party to one who voluntarily entered into contract and who was neither an infant, drunkard, married woman, outlaw, or mental incompetent. For obvious reasons, the issue of competent parties was not discussed often because colleges were reluctant to enter into litigation over the issue of competent parties. Since nearly all students before World War II were minors, litigation would have put the institution in the position of trying to enforce a contract which by definition was not enforceable.

In two subsequent cases from the 1890s the basis for and conditions and requirements of the contract were expanded upon. In People ex rel. Cecil v. Bellevue Hospital Medical College (1891), the college, presenting no grounds, refused to allow Thomas Cecil to take his final examination and refused to grant him his medical degree. According to the New York Supreme Court,

> the circulars of the respondent indicate the terms upon which students will be received, and the rights which they were to acquire by reason of their compliance with the rules and regulations of the college in respect to qualifications, conduct etc. When a student matriculates under such circumstances, it is a contract between the college and himself that, if he complies with the terms therein prescribed, he shall have a degree, which is the end to be obtained. This corporation cannot take the money of a student, allow him to remain and waste his

> time . . . and then arbitrarily refuse when he has completed his term of study, to confer upon him that which they have promised. (p. 490)

The court indicated that it would not review the college's discretion in determining whether a student should be examined or denied a degree as long as the college provided reasons or a cause for its action. In this instance, the court found that the college, in not stating any academic or disciplinary reason or cause, had not exercised its discretion properly. This constituted, in effect, a willful violation of duties. Therefore, the court reversed the lower court and granted the writ of mandamus, compelling the medical school to re-admit the student and, upon successful completion of final examinations, to give him his degree. Unlike many future cases, here the judge examined the situation and determined that the student had not violated his part of the contract. Apparently, the court did not read into the contract any implied terms which permitted the college to couch arbitrary decisions under the guise of discretionary judgment.

In a tuition dispute, F.W. Niedermeyer v. The Curators of the University of Missouri (1895), offer, acceptance, and other conditions of the contract were further defined. When Niedermeyer entered law school, a paragraph in the college catalogue stated that the tuition for law students would be $50, and the rate would be reduced in each successive year to $40.

> The paragraph in the catalogue . . . was by its very terms, a public offer to admitpersons as such to any of the classes. . . . The plaintiff's payment of $50 and receipt of his matriculation card . . . constituted an implied acceptance and also a notice of acceptance. The contractual relation created between the parties thus became complete and binding. (p. 657)

When Niedermeyer tried to register for the senior year, he was informed that the tuition rate for students was $50 instead of the $40 previously agreed upon. Niedermeyer paid the amount under protest so that he could matriculate; however, he filed suit for breach of contract.

In a decision that Jennings (1980-81) termed "controversial and unsettled to this day" (p. 193), the appellate court held for the student, using two lines of reasoning. Along the first line, the court concluded that once the student had paid the 1st year's tuition, a binding and complete contract covering all years of law study was created. Hence, the student's contractual relationship, even though a written contract was not signed, entitled him to the terms specified in the catalogue when he entered. Using another line of reasoning, the court concluded that

> if it should be contended the offer and acceptance is a contract for the first year, with an option to take the second year by paying $40, then it is binding on defendants, as the plaintiff not only appeared and demanded the right to enter under the option, before the term expired, but paid a valuable consideration for the option, which could not be withdrawn. (p. 658)

The court concluded that this option could not be altered or abridged in any way by the college once the contractual relation had been established. In the court's judgment, Niedermeyer was entitled to recover the extra $10 he had been forced to pay under duress.

Here, as in the previous New York case, the court recognized the contract between the student and the university as a valid basis for bringing an action for breach of contract before the court. While the terms of the contract were generally more favorable to the institution, the courts in these early cases indicated a willingness to consider the rights of students when the institution acted in an arbitrary and absolute manner with no explanation or where it refused to adhere to the terms it had created.

In future cases of both types, the attitude of the courts shifted somewhat. In subsequent cases where universities included provisions in its brochures, catalogues, pamphlets, or registration materials which allowed them to terminate without a stated reason the student's admission at any time or to negate the university's obligation to continue the student's enrollment for subsequent semesters or years, the courts ruled in favor of the institutions. Furthermore, future cases, such as Koblitz v. Western Reserve University (1901) and Booker v. Grand Rapids Medical College (1909), viewed the contract as one to be re-negotiated yearly.

In no way did either of the previous cases establish a precedent which obligated the institution to create a contract that would be advantageous to students or which would provide students an avenue other than litigation through which they might question or reject obnoxious policies. These courts also did not insist that institutional brochures and circulars provide justifications for those regulations which the institution determined must be followed.

Essentially, both the New York and Missouri appellate courts did not substantially deviate from the kind of thinking which had been expressed previously by the Illinois Supreme Court in People ex rel. Leonard Pratt v. Wheaton College (1866) and the Indiana Supreme Court in State ex rel. Stallard v. White (1882). These two cases, while not argued using contract principles, were similar in that the courts were reluctant to interfere in university internal affairs. Basically, the court in the 1866 case found solace in the application of the English common law doctrine of in loco parentis. Concerning the power of Wheaton College, a private institution to develop rules governing discipline, including one which prohibited students from joining secret societies while in attendance at Wheaton, the court said that

> whether the rule be judicious or not, it violates neither good morals nor the law of the land, and is therefore clearly within the power of the college authorities to make or enforce. A discretionary power has been given them to

> regulate the discipline of their college in such manner as they deem proper, and so long as their rules violate neither divine nor human law, we have no more authority to interfere than we have to control the domestic discipline of a father in his family. (p. 187)

Concerning the power of Purdue University, a public institution, to require an otherwise qualified student to sign a written renouncement of his fraternity or secret society membership as a condition of admission, the Indiana Supreme Court in 1882 held that the actions of the college faculty and board went beyond the powers granted it by the state. The school's action were both "ultra vires and palpably unreasonable" (p. 288). This court added that its opinion did not cover disciplinary procedures which prohibited secret society membership once students were enrolled; its ruling referred only to the use of this membership as a disqualification for admission. The court stated that it looked to "well established rules, either prescribed by law or sanctioned by usage" (p. 284) in order to determine the propriety of the terms of admission. In this instance, it found the college's terms to be "degrading and extraordinary" (p. 286). While clearly indicating deference to college officials in governing the college's internal affairs, this court stated that when an

> injustice has been done, or some serious mistake had been made, a plain duty is imposed, which the court can not and ought not to evade. (p. 294)

Recognizing that American colleges possessed almost unlimited power in designing the contract, the court in State ex rel. Stallard v. White (1882), like the subsequent cases involving Bellevue Hospital Medical College and the University of Missouri, felt compelled to decide on behalf of the student because there had been such a palpable abuse of the college's wide discretion. In general, however, the courts have not been inclined historically to be overly concerned about protecting student rights and privileges, because formalism, not realism, was the dominant conception of law in the 19th and early 20th century. According to Rebell and Block (1982), for the most part jurists at that time did not see their role as that of discretionary public policymakers who should render decisions which promoted desirable social purposes or which maintained a proper balance between government and individual rights. Rather, under the theory of legal formalism, the task of a judge was "to locate the relevant legal premises in both written and natural law and to apply these to the facts at hand" (p. 8).

The premises and principles of law which the 19th-century jurist attempted to apply to higher education were partially rooted in precedents established in New England and Massachusetts court cases involving civil law which afforded public school authorities almost unlimited power. Analyzing the courts' "hands-off" attitude toward institutions of

higher education, Beaney (1968) concluded that the basic attitude of early and subsequent courts

> has been a compound of deference to the expertise of the educator, fear that judicial interference in behalf of students might pose dangers to the well-being of institutions, and perhaps a subconscious feeling of aversion toward students and parents who failed to conform. (p. 574)

While Beaney's conclusion may be overstated, an understanding of prevalent jurisprudential thinking and attitudes and societal mores at the time when the student-university contractual relationship was emerging provides insight into the difficulty faced by the judiciary in striking a balance between the traditional approach of in loco parentis, which favored the institution, and the emerging application of contract law, which ideally could favor either party to the contract.

Summary

The educational contract developed against a backdrop of significant social change. Educational customs and traditions and student attitudes about the protection provided by in loco parentis underwent transition throughout much of the 19th century. After 1850, the converging religious, political, and socio-economic forces helped to reshape American attitudes and values as well as restyle American life. As socio-economic changes occurred, pioneers in countless numbers headed West, and farmers traveled to

urban areas for work. All 19th-century Americans and all American institutions were greatly affected by westward expansion, urbanization, and the resultant industrial growth.

After 1850, Americans from different sections of the country held divergent political views, and many simultaneously were affected by either a marked increase in secularism or its counterpart, evangelical revivalism. Widespread philosophical dissonance was the result. When American were confronted with the convergence of change and the clash of socio-economic systems and political beliefs, they eventually stopped compromising, and war erupted. The people of the South were consumed by the Civil War which left their colleges in chaos and the agricultural economy which supported higher education in shambles. In contrast, the North's colleges were not greatly affected by the war. Student enrollment declined slightly, but basically northern and western higher education remained stable.

In the war's aftermath, the momentum of socio-economic change was greatly intensified, and the simplicity of the previous 200 years was forsaken. Americans entered a new era characterized by what Hacker (1947) called a "crazy composite of style and attitudes that seemed to combine all of the faults of every preceding age" (p. 790). In this new, more complex era, all social institutions were changed. During this post-war era, higher education was most influenced by three new developments: the demand for technology to cope

with the shock of rapid industrial growth, the emergence of concerned and influential philanthropists whose wealth endowed colleges and universities, and the westward movement of large families with youth in need of scientific and agricultural training. The adoption and modification of German university ideals and the funds generated by the Morrill Act of 1862 also were a great influence on higher education.

While such innovative academic leaders as Michigan's Henry Tappan and Brown's Francis Wayland previously had recognized the inadequacy of higher education to meet the needs of a changing society, few substantial changes were made in higher education until after the Civil War. Previous to the founding of Johns Hopkins University in 1876, most students who wished to do graduate work had been forced to study abroad. American scholars were particularly drawn to the prestigious German universities because the scholarly German students upheld pure learning through original research which they conducted in a climate which permitted them the freedom to learn and faculty the freedom to teach and publish results.

These German-trained scholars transplanted to American higher education many of the German ideals. Among those who encouraged American colleges to adopt a more flexible, less paternalistic attitude toward students was Daniel Coit Gilman. He was selected by philanthropist Johns Hopkins to

be the founding president of Johns Hopkins, America's first graduate school. Under Gilman's leadership, the scholars at Johns Hopkins established a university model which the leaders of other American colleges and universities in the late 19th century emulated.

Other new institutions were established in the last half of the 19th century as a result of the Morrill Act of 1862. Through this legislation, public funds were made available for the establishment of "land-grant" colleges and state universities. Thus, higher education was brought within the financial reach of most of America's upwardly mobile youth. Created to teach the agricultural and mechanical arts, these service-oriented universities were intended to facilitate interest in agriculture and the practical and technological needs of the rapidly changing world. The state universities of the Midwest, some supported by land-grant funds, emerged as another model for universities. This new kind of state university was devoid of sectarian influence, dedicated to affordable education for all classes, and adapted to the practical needs of contemporary society.

Following the paths established by the founders of Johns Hopkins and the new type of state university, such academic reformers as Harvard's Charles Eliot inaugurated an era of change in traditional American colleges as well. Through implementation of a new elective system, Eliot was able to abandon the strictly classical curriculum and permit students

the flexibility to select from the expanded Harvard curriculum those classes which were more in line with their career choices and personal interests. Harvard students were encouraged to make mature decisions and to assume more responsibility for their career preparation. College officials attempted to recognize the individual differences of students and to permit them to exercise more control over their college lives. Students were no longer treated merely as wards of the college. Under this new elective system, professors also were freed of many of the custodial duties with which they had been burdened. As enrollment soared and the custodial roles of professors were greatly diminished, faculty members were able to turn to conducting and publishing their research. Professional academic administrators increasingly took over the disciplinary function once primarily exercised by professors. Over time, the gap in communication and understanding between students and academic administrators became even greater than had been the gap between the students and the faculty.

During this change from the age of the college to the age of the university, students were given more freedom and were encouraged to act more maturely. The heterogeneous students of these more egalitarian universities were not as complacent as past generations of sectarian college students had been. While previously only a small percentage of students had questioned the university's exercise of discretion in student

affairs, during this transitional age, students increasingly began to look outside the confines of the university for social support and assistance in resolving their disputes with colleges or universities. They sought fraternities, athletics, and other extracurricular activities to address their social needs and turned to the courts for intervention in their legal disputes. The once mutually beneficial relationship between students and their colleges or universities had deteriorated to such a degree that by the turn of the century, many students no longer saw the in loco parentis relationship between themselves and their universities as appropriate. Through litigation, some more independent students sought to redefine the relationship so that the relationship would be more balanced and they would be accorded more status. Instead of a parental relationship, these students sought to characterize the relationship as contractual. Under this characterization of the student-university relationship, students who were embroiled in disputes would then have an equal chance to convince an impartial court of the merits of their complaints.

While the first American court case to use contract principles to resolve a dispute between a student and a college or university occurred in 1844, other related cases were not immediately forthcoming. Such momentum did not occur until the 1890s, when a series of cases occurred in which several students sued their universities for breach of

contract. These cases were centered primarily on three areas: disputes over the withholding of degrees to students who had successfully completed the required course of study, disputes about tuition, and dismissals for alleged misconduct. These late 19th-century cases became the framework on which the terms and definition of the contractual relationship between students and universities evolved.

The idea that Blackstone's in loco parentis characterization of the student-school relationship was not entirely appropriate for all relations between American college students and their institutions was apparent even in the colonial era. Though colonial cases were resolved at the institutional level by the college president and his board, there were several cases which were reflective of the inappropriateness of the theory. Several early Harvard and Yale cases were indicative of situations where parents and respected citizens questioned the college president's authoritarian and repressive exercise of discretion. Even by stringent colonial standards, a parent who contracted with the university to train and discipline the student in a strict sectarian classical education had reasonable expectations that the "substitute parent" would act in good faith and would not arbitrarily or capriciously expel the student. College officials whose actions were egregiously

arbitrary brought to light the inadequacy of in loco parentis to appropriately define the student-university relationship.

Later 19th-century courts maintained that certain conditions had to be met in order for a contract of any kind to be enforceable. Like other 19th-century contracts, educational contracts were required to include the following elements: competent parties, offer, acceptance, valid subject matter, consideration, mutuality of agreement, and mutuality of obligation. These conditions and the implied and express terms of the contract were examined in the context of the student-university relationship as subsequent cases unfolded in the years after Middlebury College v. Chandler (1844). In People v. Bellevue Hospital Medical College (1891), the court determined that the contract terms which delineated the rights that students acquired by compliance to rules and regulations were to be found in the college circulars. This court construed the educational contract as one which placed equal responsibility on both parties. In light of this, the court refused to allow the college to withhold arbitrarily, for no stated reason, the degree of a student who had complied with all of the contract's prescribed terms. While the court recognized the college official's inherent right to exercise discretion in dealing with student discipline, it refused to uphold the official's arbitrary action as a legal exercise of discretion. However, future cases involving withholding of

degrees were met with mixed results. As the court in People ex rel. Cecil v. Bellevue Hospital Medical College (1891), some courts were willing to use mandamus to force colleges to grant degrees, while others refused to use this extraordinary remedy when the contract remedy of specific performance was available to students.

In Niedermeyer v. The Curators of University of Missouri (1895), the court continued to examine the conditions and terms of the contract. The court viewed the college's catalogue statements as an offer and the student tuition payment as an implied acceptance of the college's offer. Once the exchange of money had occurred, a complete contract was established which legally bound both parties to the terms. The college was not at liberty to withdraw, alter, or abridge the contract for the length of its entirety. Niedermeyer claimed that his contract, which was based on the catalogue when he entered, established the tuition rate for his entire educational career. When the college had altered the rate at the beginning of the senior year, he sued, and the court upheld him. Subsequent courts differed with this early interpretation of contract terms, for generally they viewed the educational contract as one which was renegotiated yearly. This was the court's interpretation in Koblitz v. Western Reserve University (1901) and Booker v. Grand Rapids Medical College (1909).

CHAPTER V
HIGHER EDUCATION FROM 1900 TO 1950: THE INFLUENCE OF THE PROGRESSIVE SPIRIT AND THE CONSERVATIVE BENCH ON STUDENT LITIGATIONS

> The felt necessities of the time--the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men--have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries and cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.
>
> (Oliver Wendell Holmes, 1897, p.1)

The combined forces of 19th-century industrialization, westward expansion, and urbanization constituted the framework upon which 20th-century America was to emerge as a major world military power, industrial giant, and leading agricultural producer. The incredible growth and economic development, stimulated by the Civil War and the shift from an agrarian to an industrial power base, had combined to reconstruct the political and economic character of American life by 1877 (Link, 1955). After Reconstruction, the captains of industry had amassed great wealth and established monopolies in America's most important industries. This

economic expansion had been accomplished through manipulation and subversion of state and municipal governments, substantial contributions to national political parties to assure federal support of laissez faire, and exploitation of cheap labor. At the same time, many of these same industrial giants also had donated funds to support opera houses, research institutions, libraries, museums, symphonies, and churches. Moreover, in spite of their greed and political maneuvering, these "robber barons" had made possible a better material life for the majority of middle-class Americans and had furnished employment, however meager, to many of the 14 million unskilled and skilled immigrants who had fled European poverty and tyranny (Link, 1955).

As the 20th century dawned, for those at the bottom of the economic system, the benefits of the American economic transformation did not offset the social injustices, economic hardships, and poor living and working conditions. Laborers and farmers most directly had felt shortchanged by industrialization. During the "Gilded Age," these groups responded with union activism and political populism in an attempt vigorously to protest the economic inequities inherent in the capitalistic system. Over the next two decades, many American scholars, writers, journalists, and social scientists also became morally and intellectually outraged at the exploitative practices of the industrial robber barons.

While life for the Protestant middle class in the small towns and cities was generally pleasant and financially secure, the constitutents of this group, with their rural evangelical Protestant tradition, also assumed a sense of personal responsibility for upholding the political and religious ideals established by the founding fathers (Hofstadter, 1956). They wished to purge the nation of the industrial robber barons whose excessive materialism was leading to the destruction of the nation's virtue (Noble, 1970). They found evidence of the destruction of the American dream and erosion of basic American ideals in a variety of social evils: political corruption, trusts, slums, child labor abuses, liquor, and prostitution.

The members of the Protestant middle class were readily joined by the members of the rapidly expanding Roman Catholic Church, which primarily represented the economically and socially oppressed urban immigrants. Activists in both religious groups became voices of moral indignation and social conscience. As followers of these religious groups joined farmers, laborers, intellectuals, and writers in awakening to the need for reform, they combined to form the backbone of what became the Progressive Movement.

The first half of the 20th century was characterized by vigorous reform during the Progressive Era and during Franklin Roosevelt's New Deal. Two world wars created interruptions in the advances and retreats from reform. The

student-university relationship, which had undergone change in the last half of the 19th century with the advent of the university, also slowly continued to evolve during the Progressive Era under the influence of John Dewey and others. Naturally, the relationship between colleges and universities and their students was emotionally and intellectually affected by the ebb and flow of the Progressive spirit and the call to arms. This relationship also was affected by shifts in jurisprudential thought and post-war changes and adjustments.

To understand the background against which the contractual relationship between the college or university and the student was evolving in the first half of the 20th century, in the first half of this chapter, two historic periods are addressed: the Progressive Era and the New Deal. These two periods provide the social context against which the actions of the judiciary and the university community can be better understood. The judiciary's conservative reaction to Progressive philosophy and the U. S. Supreme Court's support of contract liberties which protected businesses and universities often at the expense of individuals are highlighted. Moreover, the shift from the federal courts' traditional policy of restraint to activism with regard to education is presented to foreshadow the demise of in loco parentis and the beginning of the joint characterization of

the contemporary student-university relationship as contractual and constitutional.

The remainder of this chapter is a discussion of the educational contract as it continued to evolve in early 20th-century state cases until a superior state court decision in Anthony v. Syracuse University (1928) essentially resolved the issue until the 1960s. The relationship between the student and university in the post-Anthony era is also examined in light of the evolving educational contract and changing student perceptions about their status in the university community.

The Progressive Era

Theodore Roosevelt, the initiator of Progressive reform through federal legislation, was catapulted into the White House at the death of McKinley in 1901. Roosevelt, sensing the reform mood of the public, proposed new reform policies guaranteeing all Americans a "Square Deal." Essentially, Roosevelt's Square Deal was the beginning of two major eras of reform which spanned the first half of the 20th century. While the spirit of the Progressive Movement could not be identified with one specific group nor could it entirely account for the sweeping nature of future New Deal reform, those who advanced true Progressivism agreed on one concept: The state and federal government should become "positive

dynamic agencies of social and economic regeneration" (Link, 1955, p. 170).

Progressivism under Roosevelt, Taft, and Wilson

In his first annual address to the U. S. Congress, Roosevelt (1901/1963) acknowledged the truth which many Progressive groups within society already knew:

> The old laws, and the old customs which have almost the binding force of law, were once quite sufficient to regulate the accumulation and distribution of wealth. Since the industrial changes which have so enormously increased the productive power of mankind, they are no longer sufficient. (pp. 20-21)

To address the inadequacies of previous legislation, Roosevelt proposed new reform policies which would eliminate unfair restraints of trade and restore individual initiative, yet uphold the doctrine of progress.

To protect the public's interest, Roosevelt launched a national reform program which relied on an unprecedented increase in presidential power (Link, 1955). Forcefully, he lead a bipartisan crusade to restore ethics and governmental responsibility, uphold democratic ideals, and preserve peace and prosperity. In pursuit of these goals, he restored representative government in state and municipal government, breaking the robber barons' hold on the politically powerful and corrupt machines. Advancing the principle that the national interests must be superior to corporate interests, he forced the railroads, steamship lines, and telephone and

telegraph companies to submit to government regulation of maximum rates. To preserve peace and demonstrate American military might, he launched a campaign to modernize the U. S. Army and radically increase the U. S. Navy.

Roosevelt's efforts to protect consumers and his concern for conservation were indications of his willingness to place national interest above private interests. He removed from sale millions of acres of public land and established national forest reserves, national parks, and wild game preserves. Lands containing valuable natural resources and water were set aside so that private interests could not exploit these resources at the expense of the commonweal. Furthermore, he secured the passage of the Pure Food and Drug Act and the Meat Inspection Act to protect consumers.

Roosevelt subjected industrial monopolies to regulation of unfair practices by activating the Sherman Anti-Trust Act of 1890. Although he strongly advocated regulating trusts to eliminate their illegal practices, Roosevelt in no way wished to destroy large businesses merely because they were large, prosperous, and powerful. In fact, as long as they did not restrain trade, he was relatively conservative about interfering with private corporations. He divided trusts into good and bad trusts and condemned only those guilty of obstructing fair competition, restricting production, or fixing prices. In 1911, the Supreme Court in its "rule of reason" adopted this same distinction, determining that the

basic meaning of the Sherman Anti-Trust Act did not proscribe all restraints, only unreasonable ones (Standard Oil Company of New Jersey v. The United States, 1911).

Roosevelt was incredibly popular, and to the majority of the public, he personified middle-class American ideals and values. His dynamic leadership and Progressive spirit helped to inspire a generation of college youth to pursue Progressive goals and seek careers in public service. Academic leaders at University of Wisconsin paved the way for other their counterparts at other state universities with the "Wisconsin Idea," a program of university service which incorporated Progressive service ideals, moral righteousness, and brotherhood (Rudolph, 1962). At other institutions, students who were sensitized to Roosevelt's "square deal" began clubs for suffrage and good government or college settlement houses to help eradicate urban poverty, ignorance, and degradation.

Nationwide, academic leaders of the Progressive Era also responded to the Progressive spirit embodied by Roosevelt. Not only did they increase their commitment to research and extension work to serve those outside the university, but they also became much more committed to the employment and health needs of the student (Brubacher & Rudy, 1976). Support for students in their desire for increased self-government was also increased through the establishment of student councils and interfraternity councils. Special

honorary societies to recognize students with a spirit of selflessness and a commitment to service and high standards became a part of the university's commitment to Progressive ideals (Rudolph, 1962). Increasingly, academic leaders reflected the Progressive philosophy of John Dewey, the Progressive commitment to service to society, and the Progressive concern for the overall health and well being of citizens.

Roosevelt left to his successor, William Howard Taft, the job of providing a "square deal" to the people with respect to the tough domestic issues of bank regulation, currency reform, and tariff revision (Hacker, 1947). Compared to Roosevelt, Taft actually initiated twice as many anti-trust suits. He directed suits against the American Tobacco Company and the Standard Oil Company, which effectively dissolved these trusts.

While both of his attempts at tariff revision were not satisfactory to Progressives, Taft tried to address this problem. In spite of his intent to carry on in the Progressive tradition, Taft made several decisions which violated the Progressive spirit, favoring big business instead of national interests. Even though he succeeded in carrying out many of Roosevelt's Progressive ideas, his administration was unpopular because he lacked Roosevelt's personal magnetism and energetic, aggressive style. This inadequacy cost him the confidence of both Republicans and

Progressives and pitted Roosevelt against him as an third-party candidate in his bid for a second term in 1912. The Democrat, Woodrow Wilson, sucessfully defeated the splintered Republicans in the 1912 election.

Between 1910 and 1917, many Americans allied with the Progressive Movement. Progressivism became more popular, reaching its culmination in the hands of Woodrow Wilson. Wilson promised Americans a program of "New Freedom" which would eliminate unfair trade practices and special privileges and restore competition to business. Schooled at Princeton, the University of Virginia Law School, and Johns Hopkins, Wilson had risen politically from the reputation he had gained as a professor of political service and history and later as president of Princeton University. An articulate and eloquent spokesman for Progressive ideals and aspirations, Wilson's eloquence was nowhere more evident than in his first inaugural message. Addressing the obligation of government to humanity and setting the tone of the social legislative agenda for the "New Freedom," as well as Roosevelt's "New Deal," Truman's "Fair Deal," and Kennedy's "New Frontier," Wilson (1913/1963), reiterated the Progressive philosophy:

> There can be no equality of opportunity, the first essential of justice in the body politic, if men and women and children be not shielded in their lives, their very vitality, from the consequences of great industrial and social processes which they can not alter, control, or singly cope with. Society must see to it that it does

> not itself crush or weaken or damage its own constituent parts. The first duty of the law is to keep sound the society it serves. (p.84)

With the support of a Democratic Congress and with his own vision and strong leadership, Wilson was able to extend the power of the presidency after the pattern previously set by Roosevelt. Wilson pushed through key reform legislation which lowered the tariff. He helped secure the passage of the Federal Farm Loan Act to benefit farmers. Enhancing the power of the government over the unfair competitive practices of big business, he established the Fair Trade Commission. He provided for government control over the banking and credit system by creating the Federal Reserve System. Moreover, the 16th Amendment to the United States Constitution, granting the federal government the right to tax income, and the 17th Amendment, providing for direct election of senators, were also ratified and became law early in Wilson's administration.

Unfortunately, Wilson's personal magnetism did not sustain him throughout both his terms in office. Turning his attention from domestic to international affairs in his second term, Wilson saw he could no longer maintain neutrality. In 1917, Wilson recommended that Congress declare against Germany even though most American preferred isolationism. To rally support for the war, Wilson's advisors initiated a massive propaganda campaign to arouse fear of subversion and conspiracy and to increase hostility

towards foreigners and dissidents, namely, Germans, Socialists, Communists, pacifists, alien radicals, and philosophical anarchists. Congress also quickly moved to severely limit the civil liberties and right to dissent of Americans, much to the shock of Progressive jurists, especially Oliver Wendell Holmes.

The Espionage Act (1917) was passed to proscribe anyone from discouraging disloyalty or interfering with the draft. The Sedition Act (1918) subsequently was passed to severely limit dissenting citizens by imposing serious penalties upon anyone who tried to

> willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States . . . , or the Constitution, or the flag . . . , or the uniform of the Army or Navy . . . or bring the form of government of the United States or the Constitution . . . into contempt . . . or advocate any curtailment of production of any thing or things . . . necessary to the prosecution of the war. (p. 553)

As a result of this law and the emotions it stirred, the press was widely censored, books and movies were banned, and some conscientious objectors were imprisoned. Furthermore, some public librarians even removed German books from library shelves.

Education did not escape the pervasive effects of the propaganda campaign against Germans or the intense crusade against sedition. Some universities abolished their German departments. Others revoked the degrees they previously had

awarded to renowned Germans (Morison, Commager, & Leuchtenberg, 1969). Columbia University expelled a student for anti-war speeches (Sampson v. Trustees of Columbia University, 1917), and Albany Law School expelled a student for alleged socialistic beliefs (People ex rel. Goldenkoff v. Albany Law School, 1921). The respective students sued for breach of contract but lost their cases in the court of public opinion as well as the state court.

The curriculum in public schools was also altered in response to anti-German sentiment. Nebraska courts tried and convicted a teacher for teaching German to a student in a private school in violation of a state law outlawing such instruction (Meyer v. Nebraska, 1923). However, in 1923 the U. S. Supreme Court overturned the decision on the ground that the state had exceeded the limits of reasonableness in interferring with a private business.

The end of World War I did not end hostility toward dissenters, antipathy toward aliens and foreigners, or acceptance of blacks who had moved to northern urban areas during the war. Even though the wartime rhetoric had called for Americans to help bring peace to the troubled world, they preferred ardent nationalism to Wilson's idealistic peace plan. Wilson was unable to secure the necessary support for his peace agreement because his health and leadership skills had failed him, and the political tide had rapidly turned against him. As Morison (1965) observed, "it was certain

that World War I was the most popular war in our history while it lasted, and the most hated after it was over" (p. 886).

The Progressive Era came to an end as America entered World War I. Nonetheless, the effects of the Progressive Movement were so great that by the end of the Wilson administration, the tendency of government officials to intervene on the part of public interest had become an accepted political practice. This practice did not equally apply, however, to the bar and the bench, especially the U. S. Supreme Court. Products of legal traditionalism, most judges, though temporarily influenced by the Progressive temper of the times, were prone to maintain a laissez-faire posture with respect to advancing social welfare measures. Justices Oliver Wendell Holmes and Louis Brandeis were exceptions to this conservative outlook.

The Supreme Court's Response to Progressivism

The fate of social welfare legislation and trust busting increasingly lay in the hands of an activist federal court system throughout the Progressive Era. For years, the federal courts had maintained a laissez-faire attitude toward business and a policy of non-intervention with regard to review of the state's right to promulgate reasonable laws regulating the activities of businesses and individuals. A

change in judicial philosophy concerning the expansion of judicial review occurred between 1877 and 1898.

Traditionally, the judiciary had viewed its role as one of interpreting the existing law, not expanding or enlarging it. According to the traditional view, policy decisions and legislation were solely the responsibility of the executive and legislative branches of the government. In keeping with the traditional view, in Munn v. Illinois (1876), the U. S. Supreme Court majority upheld an Illinois law which established a rate schedule for grain elevators. Speaking for the majority, Chief Justice Waite found invalid the elevator company's claim that corporations like citizens were entitled to due process in cases of unreasonable infringement of property under the U. S. Constitution's 14th Amendment. Relying on the classic position of judicial restraint, the court ruled that the determination of rates was not a judicial, but a legislative function.

Over the period of the next 20 years, in various cases presented to the U. S. Supreme Court, corporate lawyers continued to ask the court to extend the interpretation of 14th Amendment rights to include corporations (Chicago, Milwaukee, and St. Paul R.R. Co. v. Minnesota, 1889; San Mateo v. Southern Pacific R.R. Co., 1882; Santa Clara County v. Southern Pacific R.R. Co., 1886). They maintained that corporations were citizens under the 14th Amendment's due process clause, and as such, were entitled to protection of

their property against unreasonable, discriminatory state regulation. Since the Progressive state legislatures persistently violated laissez faire, the U. S. Supreme Court apparently felt compelled to move into an activist mode to check their intrusive, excessive regulation of corporations. The court's reversal of its policy of judicial restraint marked the beginning of what Link (1955) called "one of the most important revolutions in judicial theory in American history" (p. 114).

After 20 years of hesitation, in Smyth v. Ames (1898), the U. S. Supreme Court finally enlarged the interpretation of the due process clause and ruled for the corporation, overturning a Nebraska law which established freight rates that prevented the railroads from making a fair profit. The court's overturn of the income tax provisions in 1894, the 1895 and 1896 curbs placed on the Interstate Commerce Commission's power to fix rates, and the temporary emasculation of the Sherman Anti-trust Act in the sugar trust case, United States v. E. C. Knight (1895), indicated that the court would use judicial review to create public policy. The court's shift from judicial restraint to laissez-faire activism "only deepened the popular conviction that the Supreme Court had become the tool of railroads, corporations, and millionaires" (Link, 1955, p.116).

During the administrations of Roosevelt, Taft, and Wilson, the U. S. Supreme Court became increasingly more

active. In some cases during the Progressive Era and increasingly between 1921 and 1930, the laissez faire economic theory advanced by Herbert Spencer was practically canonized. In accordance with the conservative philosophy that state government should not interfere in the affairs of businesses or individuals, the courts postulated a theory concerning the liberty of contract. Justice Harlan in Adair v. U.S. (1908) explained liberty of contract as "the right of a person to sell his labor upon such terms as he deems proper" (p. 174).

In Lochner v. New York (1905), the U. S. Supreme Court in a five to four decision overturned as unreasonable a New York appellate court decision supporting a state law restricting the working hours of bakers to 10 hours per day. The New York court had upheld a lower court conviction of Lochner, a bakery owner who had violated this restriction. The Supreme Court majority contended that the state law violated the individual's right of liberty to contract guaranteed by the due process clause of the 14th Amendment. The due process clause acknowledged that the police powers of the state could be used to promote the health, safety, and welfare of the state's citizens as long as its action was not unreasonable or arbitrary. In spite of compelling evidence to the contrary, the majority ruled that baking more than 10 hours a day was not injurious to an employee's health. In his famous dissent, Progressive jurist Holmes, charged that the court's

decision enlarged the 14th Amendment beyond the authors' intent. Holmes' dissent later became the gospel of the "New Deal" court with respect to the relationship between government and the people:

> This case is decided upon an economic theory which a large part of the country does not entertain. . . . The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been the shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or managerial institution which takes his money for purposes thought desirable, whether he likes it or not. The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . [A] Constitution is not intended to embody a particular economic theory, whether paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or moral, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States. (pp. 75-76)

Other U. S. Supreme Court decisions from 1909 to 1917 were more supportive of Progressive legislation. The court gave the states support in their efforts to protect children through tough child labor laws. Also the court upheld states in their attempts to limit a woman's work day to 10 hours in Muller v. Oregon (1908) and to 8 hours in a similar California case. Later in Bunting v. Oregon (1917), the court essentially reversed Lochner v. New York (1905) by

approving a 10-hour work day for men in industrial jobs. The court also upheld industrial accident insurance.

Before 1911, much debate had centered on the issue of the regulation of trusts using the Sherman Anti-Trust Act. Reinterpreting this law, the court in the Standard Oil and American Tobacco cases handed down two important decisions in 1911. They declared that each of these trusts was an illegal consolidation and must be dissolved. They further noted that only "unreasonable" restraints of trade violated the Sherman Anti-Trust Act. In Standard Oil Company of New Jersey v. The United States (1911), the Supreme Court promulgated the famous "rule of reason" as the standard to be used in determining violation. Many Progressives were infuriated at yet another attempt by the court to dismantle necessary legislation through judicial activism. Link (1955), however, noted that the "rule of reason" made the Sherman Anti-Trust Act more enforceable and thus an effective tool for destroying monopolies. In effect, the "rule of reason" distinguished between good and bad trusts, sanctioning business as usual for corporations that were large and powerful but whose business practices were fair.

In like manner, state courts applied the test of reasonableness in their decisions about contract disputes between students and their colleges or universities. Few courts in the Progressive Era were willing to disregard institutional regulations or substitute their expertise for

that of seasoned institutional leaders in favor of students. In cases before the turn of the century, students had prevailed in several cases; however, after the new philosophy of the U. S. Supreme Court filtered down to the state level, students did not fair well except in a few cases where their rights were egregiously ignored. For the most part, courts vigorously upheld the untrammeled authority of institutional leaders much the same as the Supreme Court upheld management in their disputes with labor. Essentially, the deference given to academic authorities was consistent with the Supreme Court's activist laissez faire posture.

From 1921 to 1930 during the administrations of Harding and Coolidge, devout champions of business, several new appointments to the U. S. Supreme Court created a strong conservative majority. The more conservative court again returned to the principles of laissez faire expounded earlier in Lochner v. New York (1905). With the support of conservatives and reactionaries, much of the Progressive Era's social legislation was nullified. This was especially true in the fields of civil rights, state regulation of business, child labor policies, and work conditions, hours, and salaries.

Two landmark decisions concerning education also were decided during the reactionary period which followed the Progressive Era. In Meyer v. Nebraska (1923) and Pierce v. Society of Sisters (1925), the U. S. Supreme Court used the

due process clause of the 14th Amendment to strike down unreasonable governmental interference in private schools. As previously mentioned, in Meyer v. Nebraska (1923), the court overturned a state statute forbidding the teaching of a foreign language to students in grades 1 through 8. In Pierce v. Society of Sisters (1925), the court overturned an Oregon Law which prohibited parents from sending their children to parochial schools. Safeguarding the liberty and property rights guaranteed by the 14th Amendment, the court refused to force private schools to submit to unreasonable state interference in the operation of a private corporation or with the freedom of parents to guide their children intellectually and religously.

In the years after World War I, state courts across the country naturally were influenced by the reluctance of the U. S. Supreme Court to interfere in the operation of a private school. The weight of these two precedents soon began to be felt in a variety of ways. The New York Supreme Court adopted the liberty to contract concept and applied it to the contractual relationship between students and their universities in the landmark case, Anthony v. Syracuse University (1928). Naturally, since the U. S. Supreme Court in two precedents had upheld the sanctity of private schools, the state court was neither likely to intervene with a private school's right to establish reasonable rules of operation, nor was it willing to interfere with an

individual's right to contract, regardless of whether or not the terms of the contract were advantageous to that individual. Essentially, the state court system during this period was not out of tune with the conservative, sometimes reactionary, philosophy apparent within the federal judiciary, Washington political circles, and society at large in the boom years between the Progressive Era and the Great Depression.

The Post-World War I Period

Progressives had made strides in solving some social and economic problems, but in the process they had created others. As the old age was passing, American society in the post-war era was uncertain about its fundamental social standards. According to Handlin (1968),

> the family, the church, and other community organizations adjusted painfully and not always adequately to the shifting needs of their members. The resulting tensions persuaded some Americans that only resistance to further change would solve them. (p. 365)

In the post-World War I era, the changes in traditional social customs and the breakdown in morality were evident in many groups within society. Citizens of large cities were plagued by organized vice, gambling, racketeering, murder, and bootlegging. Citizens from all level of society were touched by hedonism, increased venereal disease, delinquency, and divorce. Bigotry, hatred, and political corruption by

the Ku Klux Klan, which had gained a political following of 5 million by 1925, had spread across small towns and cities, primarily in the Southwest, Midwest, and Far West (Link, 1955). Accusations of anti-intellectualism and ridicule of marriage, organized religion, patriotism, and democratic ideals came under assault from such literary rebels as H. L. Mencken.

Advocates of the old moral code cited college and urban youth as evidence of the failure of religious and social sanctions to curb the excesses of the "lost generation." According to many fundamentalist religious factions and rural small-town conservatives, the prototypic liberated collegiate "flapper" bobbed her hair, wore short skirts and excessive makeup, and allegedly spent much of her leisure time voraciously reading confession magazines. Her male counterpart read Sigmund Freud's works and spent his leisure time attempting to liberate his suppressed libido by engaging in sexual experimentation in the rumble seat of his new car. Furthermore, collegiate couples allegedly went to night clubs or speakeasies where they listened to "sensual" jazz, danced in close embraces, and drank bootleg whiskey or homemade bathtub gin. Even if this view was distorted, many of the youth of the 1920s on and off college and university campuses challenged the traditional rules of sexual conduct and were more interested in sports, fun, and social advancement than they were in serious work and study. Naturally, those who

advocated the old moral code welcomed the strict rules of collegiate conduct and authoritarian terms of the educational contract which college youth fervently despised.

If any of the farmers or small-town conservatives doubted the urgency of this social and moral upheaval, two developments confronted them with society's repudiation of past values and beliefs: the evolution debate and women's suffrage. The John Scopes trial in 1925, which became a famous media event and one of the great legal battles of the century, was a shock to the sensibilities of many Americans. For observers of this case, which pitted Darwinism against Fundamentalism, little doubt remained that basic beliefs and institutions were under assault.

If the evolution debate were not enough to cause alarm among conservatives and traditionalists, the new attitudes of women were enough to compound their resistance to change. Through the enduring efforts of the "suffragettes," women achieved equal voting rights in the 1920s. Women governors took the helm in Texas and Wyoming. Young women moved away from home or entered college, found jobs in urban areas, and began demanding the end of the double standard. In large numbers, women also began drinking, smoking, and openly expressing a desire for greater sexual freedom. Collegiate battles over in loco parentis and increased demands for contractual rights were outward signs of changing female attitudes.

Rekindled Fundamentalism and Prohibition were reactions to the liberal ways of society and the pressure for greater academic freedom in education. Throughout the "Roaring Twenties", fundamentalists struggled with the proponents of academic freedom because of their Progressive educational policies and desire to teach Darwinism and Freudianism in the classroom. While conservative religious elements were busy fighting educational liberals, other highly vocal liberal Congregational and Methodist leaders were establishing dialogue with the intellectual liberals from the social sciences, advancing the "gospel of social service" (Link, 1955, p. 330). This trend shocked the conservative religious groups and further motivated them to rally in defense of traditional values. Overall, however, most churches withstood "the erosion of antagonistic concepts like Freudianism, scientific management, and behaviorism" (Link, 1955, p. 333).

The Re-emergence of Laissez Faire

On the political front between 1921 and 1933, conservative forces remained strong in the executive and judicial branches, counterbalancing a more Progressive legislature. Republican Warren G. Harding entered the White House at the beginning of the "Roaring Twenties," promising to restore "normalcy" after two terms of Progressive Party executive and legislative domination. The election of

Harding, an advocate of laissez faire, represented the public's need to recover from the war and stabilize. Responding to the temper of the times, from 1921-1933, Republicans Harding, Coolidge, and Hoover established policies which favored isolationism, supported big business, and curtailed governmental interference in private enterprise.

During Harding's administration, Americans saw the return of legislation favorable to business and tax breaks for the rich. Mirroring much of the social upheaval and rejection of moral values, Harding's administration was ridden by political scandals. His personal behavior was no less scandalous than that of the youth of the "lost generation." Even the White House was permeated with gambling, drinking, womanizing, and criminal behavior.

Harding's successor, Coolidge, was equally devoted to laissez-faire. In his campaign slogan, Coolidge maintained that the business of America was business. During his term in office, America experienced a great economic boom, and Coolidge supported all efforts to encourage the growth of large corporations. He regarded "the entire Progressive movement since Theodore Roosevelt's day with cynical distrust" (Morison, Commanger, & Leuchtenburg, 1969, p. 419). Coolidge presented little constructive legislation and favored a continuation of the conservative policies of Harding, which supported high tariffs, lower taxes, the

lowest possible control over private capital, government support of management over labor, and defense of the conservative and reactionary decisions of the courts.

In his 1928 campaign, Hoover extolled the values of American rugged individualism. As president, he prepared to continue the prosperity of the previous 8 years of Republican leadership. Confidence in business soared, and easy credit encouraged overextension. Businesses continued to turn profits into stock dividends instead of salary increases, and stock speculators bought extravagantly. Furthermore, during the 12 years after the war, all three administrations had continued to dilute the power of the Federal Reserve Board and the Trade Commission to effectively control business. Harding, Coolidge, and Hoover did little to address economic problems or anticipate the downfall of the American economy. Intellectuals, economists, and business analysts who were knowledgeable of the rise and fall in economic cycles and in a position to exert influence also did not assert themselves. Less than a year after Hoover's election, the stock market crash occurred.

In the aftermath of the 1929 stock market crash, America experienced its worst depression. The prolonged depression reached peaked in 1932-33 and did not end until the Second World War. Eschewing government intervention, Hoover called on the people to exercise courage, personal resolution, and resourcefulness. Reminiscent of his laissez-faire approach,

Hoover (1931), quoted in the New York Times, presented his response to the worsening economic slump in his Lincoln's Day radio address, February 12:

> The ever-growing complexity of modern life, with its train of ever more perplexing and difficult problems, is a challenge to our individual characters and to our devotion to our ideals . . . . Success is not gained by leaning upon government to solve all the problems before us. That way leads to enervation of will and destruction of character.
>
> Victory over this depression and over our other difficulties will be won by the resolution of our people to fight their own battles in their own communities by stimulating their ingenuity to solve their own problems, by taking new courage to be masters of their own destiny in the struggle of life. (p. 4)

Hoover's faith in the self-adjusting economy and his use of conventional methods gradually demoralized the masses. In the election of 1932, millions of poor immigrants, small businessmen, and lower-middle-class farmers and laborers united politically against the laissez-faire state. In 1933, Democrat Franklin Roosevelt led America into the "Third American Revolution," a social revolution in which "the whole concept of the state, or national government, underwent metamorphosis" (Hacker, 1947, p. 1125).

The Social Impact of the Roosevelt Years

Few individuals in American history have altered the course of American history more than Franklin Roosevelt. According to Hofstadter (1957),

> no personality has ever expressed the American popular temper so articulately or with such exclusiveness. In the Progressive Era national reform leadership was divided among Theodore Roosevelt, Wilson, Bryan, and La Follette. In the age of the New Deal it was monopolized by one man, whose passing left American liberalism demoralized and all but helpless. (p. 311)

Throughout his tenure as president, Roosevelt was continually bold, flexible, and receptive to economic experimentation. At times, many critics considered him opportunistic. As he directed his reform program called the "New Deal," he was well served by his good political instincts, his solid communication skills, and his desire to be surrounded by bright, energetic advisors and officials who were constantly generating new ideas. His style and creative leadership during the "New Deal" were sufficient to make him an American legend, but the dominant role he played in World War II elevated him to a position of international prominence as well.

The New Deal, 1933-1939

From the beginning of his campaign for the White House, Roosevelt personified courage and energy and inspired the loyalty and confidence of the people. In contrast to Hoover who blamed the Depression on outside influences, Roosevelt saw the source of the nation's problems as internal and gave a candid description of the situation. Realizing that some program of action was imperative to pull the nation out of

the heart of the Depression, in his first inaugural address, Roosevelt (1933/1957) cautioned the nation that the greatest obstacle to recovery was fear itself--"nameless unreasoning, unjustified terror which paralyzes needed efforts to convert retreat into advance" (p. 90). Continuing, Roosevelt (1933/1957) courageously confronted the dismal state of affairs:

> Values have shrunken to fantastic levels, taxes have risen. Our ability to pay has fallen; government of all kinds is faced by serious curtailment of income; the means of exchange are frozen in the currents of trade; the withered leaves of industrial enterprise lie on every side; farmers find no markets for their produce; the savings of many years in thousands of families are gone.
>
> More important, a host of unemployed citizens face the grim problem of existence and and an equally great number toil with little return. Only a foolish optimist can deny the dark realities of the moment. (p. 90)

Roosevelt concluded by offering to take direct, aggressive action to deal with this crises.

Roosevelt 's reform program was immediate but experimental. His plan was to provide immediate relief to all citizens from privation and despair and to promote economic recovery. He coupled this with a massive program of reform to address the problems which had produced this crisis. In an unprecedented blitz of reform legislation within his first 100 days in office, Roosevelt "pushed through" the Congress 12 pieces of legislation which transformed the laissez-faire state into the social-service

state. This first wave of government intervention swept across banking and credit, private industry, agriculture, utilities, world markets, and labor. Government intervention provided relief for the unemployed, the elderly, the homeless, and the needy.

Some of these and other New Deal programs were studied by Roosevelt's "brain trust" and carefully planned. Others were poorly conceived and quickly abandoned. Many were experimental and highly improvisational. Regardless of the methods employed or their lack of rationality, New Deal reforms were implemented to restore the confidence of all Americans in their government, to promote the welfare and security of the forgotten ordinary citizens, or to stabilize business, industry, banking, and agriculture. By 1939, the New Deal was politically exhausted. Proceeding without reservation, Roosevelt next turned his attention to Europe where Hitler was overwhelming continental Europe and threatening to turn on Britain.

World War II, 1941-1945

In spite of its announced neutrality, America's entrance into World War II came as no shock to Roosevelt and his advisors. In 1939, Roosevelt had greatly increased defense spending in anticipation of American military involvement. Roosevelt had been assisting the British through lend-lease since early in 1941. France had fallen to Hitler in 1940,

and England was under constant assault from the Germans. Japan's attack on Pearl Harbor on December 7, 1941, had brought about the inevitable. In spite of Roosevelt's expectation that America might enter the war, the mobilization of troops and equipment was time consuming and expensive.

World War II brought about many changes in American culture and daily life, many of which are beyond the scope of this study. Unemployment and the economic effects of the Great Depression became things of the past as the entire nation marshalled its physical and economic resources to support the war effort in Europe and Asia. Many women served in the service forces or in war production at home. Ordinary citizens and even celebrities donated time to the United Service Organization, the Red Cross, or the government's drive to sell war bonds. In an effort to assist the total war effort and to control inflation, the government increased corporate and personal taxes, rationed scarce commodities, and controlled prices and rents. All men from the ages of 18 through 45 who were mentally and physically qualified became eligible for the draft. In all, over 15 million people enrolled in the armed services as the rest of the nation fully committed itself to the total war effort.

In large numbers, college-aged men became a part of the armed forces or worked in agriculture or manufacturing to assist in the war effort. Colleges and universities had just

begun to recover from the Depression when their enrollments plummeted because of the draft. State support for education was limited, and private donors were more likely to buy war bonds than they were to make investments in private colleges. The expertise of scholars and scientists was enlisted by the Office of Scientific Research and Development for research related to medicine, chemical warfare, and sophisticated weapons. Great strides in science and medicine resulted from this federal effort.

After 4 long years of war, American soldiers began returning home in 1945 to resume their lives. In appreciation for their service, in 1944 Congress passed the Serviceman's Adjustment Act, popularly called the "G.I. Bill of Rights." This bill provided benefits to returning veterans; among them were funds for higher education and vocational training. From 1945 through 1952, this program supplied 13.5 billion dollars for education and training (Link, 1955, p. 628). Because of this government funding, college enrollment spiralled to 2,659,021 in 1950 from a low of 1,155,272 in 1944 (Link, 1955, p. 617).

The Supreme Court's Response to the New Deal

Some historians regard Progressive reform under Theodore Roosevelt and Woodrow Wilson and New Deal reform as a continuum. While both reform movements had some

similarities, Hofstadter (1956) argued that as a whole, the New Deal marked

> a drastic new departure in the history of American reformism. The New Deal was different from anything that had yet happened in the United States: different because its central problem was unlike the problem of Progressivism; different in its ideas and its spirit and its techniques. Many men who had lived through Progressivism and had thought of its characteristic proposals as being in the main line of American traditions, found in the New Deal an outrageous departure from everything they had known and valued, and so could interpret it only as an effort at subersion or as the result of overpowering alien influences. (pp. 301-302)

The majority of the U. S. Supreme Court's membership in 1933 was part of this conservative group who believed that "the New Deal was destroying the historic American pattern of individual responsibility and local initiative by placing the nation's future in the hands of starry-eyed professors and power-mad bureaucrats" (Morison, 1965, p. 968). In less than 2 years after Roosevelt's first New Deal programs had gone into effect, the leaders of business and industry were antagonistically challenging the constitutionality of government restrictions placed on them by the National Industrial Recovery Act and enforced by the Roosevelt "brain trust".

Several cases concerning the constitutionality of New Deal measures reached the U. S. Supreme Court in 1935. By this time Holmes had retired and only the three Progressives, Brandeis, Cardoza, and Stone, could be counted on to support

the principle of judicial restraint regarding New Deal legislation. These three justices did not have sufficient power to dissuade the court's majority from overturning several key pieces of New Deal legislation. These court decisions were a prelude to the court's devastating decision in A.L.A. Schechter Corporation v. United States (1935). In this case, the National Industrial Recovery Act, which guaranteed collective bargaining between management and labor and created codes of fair competition in every industry for the regulation of competition, wages, and hours, was unanimously held to be unconstitutional on the ground that it was an improper application of the commerce power. The court ruled that Congress could not delegate the power to legislate codes to the President.

Shortly after this blow, in United States v. Butler 1936) the Agricultural Adjustment Act was ruled unconstitutional as an overly broad interpretation of the taxing power. In other sweeping decisions, the 1936 Supreme Court nullified more key legislation and seemed ready to doom future reform efforts. Furthermore, the state courts were so eager to follow the path set by the U. S. Supreme Court that, by 1937, they too had used the power of injunction 1,600 times to cripple New Deal reforms (Link, 1955, p. 414). Moreover, practicing judicial activism, the entire judicial system was waging war with New Deal legislation, as it had with Progressive legislation in the 1920s.

By the summer of 1936, Roosevelt became increasingly alarmed that his reform movement would soon be destroyed. In 1937, shortly after his overwhelming 1936 re-election, he responded to the court's restriction of legislative authority by calling on Congress to pass legislation reorganizing the court and infusing it with new blood. He failed to secure legislative support for a plan to pack the court with six new justices, one for each of those who were over 70 and refused to retire. The people also "balked" at this extreme measure in spite of Roosevelt's personal popularity.

Apparently, Roosevelt succeeded in equally alarming the court. In 1937, while Roosevelt was still trying to negotiate a compromise on judicial reorganization, the court did an about-face and promptly began validating reform measures. Perhaps in this crisis, the judicial activists had time to pause and reflect upon the words of their Progressive collegues, Brandeis and Stone respectively, whose dissents had admonished them against excessive judicial activism:

> We must be ever on our guard lest we erect our prejudices into legal principles. (New State Ice Company v. Liebmann, 1932, p. 265)

> Courts are not the only agency of government that must be assumed to have capacity to govern. (United States v. Butler et al., 1936, p. 8)

By 1937, a broad interpretation of the U. S. Constitution's general welfare clause by the court's majority was insured with the replacement of retiring Justice Van

Devanter, a confirmed conservative. By 1941, through the death and retirement of other justices, Roosevelt was able to reconstruct the Supreme Court, appointing a new chief justice and seven of the eight associate justices. By virtue of his unprecedented years in office, Roosevelt was also able to insure that all new district court judges appointed were also supportive of the new sociological jurisprudence practiced by the "Roosevelt Court."

The formation of a Roosevelt Court sympathetic to government intervention for the promotion of the public's health, safety, and welfare and sensitive to civil and religious freedom was the beginning of a new age in American judicial history. This new court began to invoke the philosophy of Justices Holmes and Brandeis, the role models for judicial restraint. The Roosevelt Court was anything but restrained, however. While it showed restraint with respect to the right of officials of state and federal governments and administrative agencies to regulate in the public's interest, the Roosevelt Court turned actively to safeguarding the constitutionally guaranteed religious, political, and civil liberties of all persons, particularly blacks. As aggressive as the court had previously been when upholding individual liberty to contract and laissez faire from the 1920s to 1937, it now was as aggressive in upholding individual civil rights.

Beginning in 1938, the newly-sensitized U. S. Supreme Court made the first of a series of landmark decisions regarding education. Prior to this, the court had viewed education as strictly a state and local matter. In Missouri ex rel. Gaines v. Canada (1938) the court struck down a Missouri state law prohibiting Gaines, a black man, from entering the University of Missouri Law School, a segregated state university, because no other school was available to blacks. According to Alexander (1980), this ruling was significant because

> it represented a reassertion of judicial authority in construing the Equal Protection Clause as a limitation on previously unfettered state action in education. (p. 459)

In the early 1950s, the Supreme Court completely overturned the separate-but-equal public facilities policy for blacks and whites and launched into an unprecedented era of court intervention designed to insure that public policy carefully observed the constitutional rights of students. The Supreme Court did not specifically apply constitutional rights to the student-university relationship in state universities, however, until much later in the 1960s. In 1950, the in loco parentis characterization of the relationship was in decline. The contractual characterization of the relationship continued to apply in public and private colleges and universities, as it previously had since decisions regarding degree withholding,

expulsion, and tuition in the late 19th and early 20th-century had begun to give substance to the terms of the educational contract.

Twentieth-Century Cases before Anthony

As the contractual theory emerged at the turn of the century, cases primarily involving dismissals and expulsions, tuition disputes, and degree withholding primarily were brought to the attention of the state courts. These early cases established the relevance of the contractual relationship and helped to give form and substance to the contract as it applied to higher education. Like People ex rel. Cecil v. Bellevue Hospital Medical College (1891), these cases supported the idea that the relationship between the college and its students could be legally defined as contractual. The courts in some of the cases viewed the contract as an express contract, but most recognized that in the absence of a written commercial contract, the overall educational contract was an implied or quasi-contract. Moreover, in the first half of the 20th century, all efforts of students to sue colleges or universities for breach of contract occurred in an era when philosophically the courts often used laissez faire, judicial inexpertise, or liberty of contract as justifications for non-interference in college or university affairs.

Expulsion Cases

Once students began to use the courts for redress, the issue of student expulsions became the basis for a series of important cases determined at the state level whose precedents had lasting effects. Above all others, the issue of expulsions sharply contrasted the conflicting interests of students and higher education institutions. Students as citizens understood the educational contract's implied terms to guarantee institutional reasonableness and procedural fairness. In contrast, the institutions understood the same contract's terms to guarantee institutional autonomy and a continuation of customary, often paternalistic, discretionary authority over their students. Because of the time, money, and severe deprivation involved, dismissals and expulsions of professional school students were the issue in several of these early cases.

One of the cases at the turn of the century was a suit entered by a law student against Western Reserve University, a private institution, seeking injunctive relief from a dismissal based on disruptive behavior and poor academic progress. For the first time in a contract case, the Cuyahoga Circuit Court in Koblitz v. Western Reserve University (1901) carefully distinguished the extent to which it would be willing to interfere in the discretion exercised by a private university as a corporation as opposed to a public university in disciplining its students. Citing

Trustees of Dartmouth College v. Woodard (1819), the circuit court articulated that it would only interfere in the internal affairs of a private corporation to insure that the board of trustees was complying with the intentions of the private donors and carrying out the purposes of the trust (p. 518). The circuit court also carefully outlined the obligations incurred by both parties to the educational contract. Reflecting some aspects of in loco parentis, the court provided the following explanation concerning these mutual obligations:

> What then are the terms of the contract? He upon making that contract, agrees to submit himself to the reasonable discipline of the school. He agrees that his conduct and character shall be such as to in no manner be a detriment to the school; and this conduct and character he must bear in all his relations with the school and with the other students. He agrees that he will conform to the customs of the school; if it is the custom of the school that the professors shall discipline the scholars, reprimand, and inflict such punishment as is proper under the circumstances, then he has agreed that he will conform to that custom. And he agrees that when he fails in any of the duties devolving upon him, the authorities over the school may discipline him in such manner as shall be proper under the circumstances.
>
> The university agrees with him that it will impart to him instruction; that it will aid him in the ordinary ways of his studies; that it will treat him fairly; that it will give him every opportunity to improve himself, and that it will not impose upon him penalties which he in no wise merits, and that it will deal with him impartially. (p. 522)

While the Cuyahoga Circuit Court acknowledged that obligations existed for both parties, it saw the agreement as one rooted in academic custom. By custom, disciplinary decisions were largely a responsibility of the faculty and not the board of trustees as Koblitz had claimed. This custom had gained the force of law over time. According to the court, if the student had a contract as he claimed in his suit, "then he submitted himself in that contract to be disciplined by the faculty of the school" (p. 522). Using this reasoning, the court sanctioned Western Reserve University Law School's refusal to readmit Koblitz to his second year because of continuing misconduct, in spite of the fact that Koblitz was not afforded all the formalities associated with a formal trial. While it upheld the student's right to present evidence of his innocence, the court found that the private institution was not required to provide a full hearing nor was it necessary or practicable for the board to be convened to hear these kinds of cases. According to the court's understanding of the contract's implied terms, the student had agreed to adhere to the terms, customary procedures, and judgment of the school's representatives with respect to disciplinary matters, including expulsions. In essence, the court's decision in this case was a merger of the traditional in loco parentis doctrine and the emerging contract doctrine.

Another law student turned to the courts the following year in an attempt to overturn his dismissal. In Goldstein v. New York University (1902), the New York Supreme Court upheld the New York University Law School's decision to expel a student for making false charges against another student and for denying that he had written an innocuous, but unappreciated, letter to a fellow female law student. Goldstein had persistently affirmed that he had conveyed the letter to the young lady at the request of another student whom Goldstein accused but the institution had determined was innocent. The trial court had provided injunctive relief to Goldstein; however, as in Koblitz (1901), the New York Supreme Court reversed the trial court and construed the implied terms to justify dismissal. The court observed that

> the relation existing between the university and the student is contractual. The plaintiff became a student . . . through an invitation contained in a circular issued by the authority of the university. . . . Obviously, and of necessity, there is implied in such contracts a term or condition that the student will not be guilty of such misconduct as would be subversive of the discipline of the college or school, or as would show him to be morally unfit to be continued as a member thereof. The power of suspension or expulsion of students is an attribute of government of educational institutions. (pp. 740-741)

In this instance, the New York Supreme Court determined that the school had properly exercised the powers granted it in questions of discipline. The student had been notified in advance, and the charges against him had been investigated in

his presence. Under these circumstances, the court felt the student was not entitled to any further procedural protection, nor was he entitled to reinstatement. The idea of the reasonableness of the substance of the charge or consideration of the appropriateness of the punishment were not real considerations of the court. While the trial court had questioned the propriety of the university's idea that as one party to the contract, it should also serve as a tribunal to determine if the other party, the student, was guilty of a breach of their contract, the appellate court did not find this practice unreasonable.

While the court in Koblitz (1901) established that the student implicitly agreed to conform to academic customs, and the court in Goldstein (1902) established that the student agreed to avoid actions that were morally unfit or conduct which would subvert the school's discipline, the Supreme Court of Michigan concluded that the implied contract also placed some boundaries on the school's authority. In Booker v. Grand Rapids Medical College (1909), a group of black students who were admitted into the first year of a 3-year veterinary program in 1907 were not permitted to return in 1908, even though they had violated neither academic nor disciplinary requirements. Like the student in People ex rel. Cecil v. Bellevue Hospital Medical College (1891), these students asked the court to issue a writ of mandamus forcing the school to re-admit them instead of requesting the

traditional legal remedy of specific performance. In determining the case, the Supreme Court of Michigan could find no state statutory requirement which imposed a duty upon the school to admit these students a second year. Furthermore, in contrast to the ruling of the Kansas City Court of Appeals in Niedermeyer v. The Curators of the University of Missouri (1895), the Michigan court could find no evidence of implied or express contract provisions which bound the college to admit them for the entire course for 3 years. However, the Supreme Court of Michigan did recognize an implied understanding that the students should not be "arbitrarily dismissed" (p. 591). Since, by the dictates of legal tradition, mandamus proceedings were not the appropriate remedy to compel performance of an obligation which arose out of contract, the court, while recognizing "the apparent hardship of [the] particular situation" (p. 591), refused to depart from tradition as the court in Cecil (1891) had done. Although this ruling did not help these particular students, subsequent courts cited the case as support in later student cases involving "arbitrary" dismissals.

Other courts, recognizing that a contract placed restraints upon both parties to the contract, verbalized instances in which the courts would interfere in the university's exercise of discretion in cases of student expulsion. The Court of Appeals of Kentucky in Gott v. Berea

College (1913) held that if the college's aims and regulations were "unlawful or against public policy" (p. 380), the courts would intervene on behalf of the student. The next year the same court in Kentucky Military Institute v. Bramblet (1914) added that it would also intervene if college officials who enforced discipline policies acted "arbitrarily or for fraudulent purposes" (p. 809). In the dismissal of a law student, the Wisconsin Supreme Court in a degree withholding case, Frank v. Marquette University (1932), described the impermissible action as "unreasonable, arbitrary, or capricious" (p. 127). The Florida Supreme Court in John B. Stetson University v. Hunt (1924) said it would afford relief to students who suffered under rules which were "unauthorized, against common right, or palpably unreasonable" (p. 640). In a tuition dispute, McClintock v. Lake Forest University (1921), the Illinois Appellate Court stated that it would interfere on the student's behalf if the school was acting in bad faith and the enforcement of rules arose "from malicious or improper motives" (p. 474). In other expulsion cases, impermissible actions which prompted court interference were similarly characterized by courts as actions "without sufficient reason" (Anthony v. Syracuse University, 1928, p. 440); outside the "scope of their jurisdiction" (People ex rel. Goldenkoff v. Albany Law School, 1921, p. 349); and not in "good faith . . . or from malice" (Robinson v. University of Miami, 1958, p. 444).

A law student in Yale Law Review ("Comment, Private Government on the Campus," 1963) noted that all of the previous restrictions might be subsumed under a minimum standard requiring "reasonableness". He suggested that the standard for reasonableness might be expressed the following way: "expulsions must proceed from reasonable rules reasonably applied" (p. 1375). The student further stated that, while the courts may have handed down decisions which stated that they would provide students some protection from institutional abuse of discretion under certain circumstances, in reality, the courts did not provide any "meaningful content [to] the reasonableness rule" (p. 1375).

Tuition Disputes

While cases involving expulsion involved greater consequences for the student, contract disputes in which students sued for tuition refunds or the university demanded unpaid tuition were far more common at the turn of the century. Unlike the expulsion cases, the contract or the terms implied in the contract proved to be advantageous to both parties to the contract in tuition disputes. In William v. Stein (1917), the New York Supreme Court, citing its previous "all or nothing" ruling in Kabus v. Seftner (1901), viewed the contract between Miss Sayward's School and the parent, Stein, as "entire and indivisible" (p. 837) and not amenable to separation or apportionment. The court concluded

that the parents of a student, who had withdrawn before the end of the first term, were responsible for the entire year's tuition. A notice contained in the catalogue stated that the contract was for a full year and that no reduction in tuition would be made for any cause except prolonged illness (p. 836). The New York Supreme Court reasoned that since the institution had executed its obligation and was willing to carry out its part of the contract in its entirety, the student's parent must do likewise. Under no circumstances would the court sanction "partial success" for both sides (p. 540). The ruling in William v. Stein (1917) became the generally accepted rule. The New York Supreme Court again upheld this rule in 1922, holding for the institution in Van Brink v. Lehman (1922). Various other courts devised ways to maneuver around the "all or nothing" rule so that students who remained in school only a short while would not have to pay the balance due on their tuition for the entire year. In Kentucky Military Institute v. Bramblet (1914), the student filed suit for a refund for the remainder of the semester's tuition after he had been expelled from school a month after classes started for hazing another student in violation of school catalogue provisions. The school answered with a countersuit for the entire year's tuition in accordance with catalogue provisions. Because the school had waived other parts of the catalogue provisions concerning tuition, the trial court had nullified the catalogue provisions as a basis

for the school's counterclaim and awarded a proportional refund to the student. However, the appellate court did not support the student's claim because his dismissal was not due to the failure of the school to carry out its contractual obligation, but to the student who, by misbehavior, had forfeited his right to remain in school. The appellate court, reversing the trial court, permitted the school to retain the entire semester's tuition because the school had been prepared to carry out its obligation.

Some tuition cases rested on claims that the institution, not the student, had breached the contract first. Following this line of reasoning, the student could recover tuition because the school had refused to perform the contract, and this action had nullified the student's contractual obligation. This was the issue before the Illinois Appellate Court in Manson v. Culver Military Academy (1908). In this instance, the father of a chronic discipline problem sued for breach of contract and recovery of tuition after his son had been expelled. Cadet Manson had been expelled after collecting nearly 200 demerits in one semester and after insubordination in refusing to perform the attendant punitive guard duty. The terms of the catalogue and academy regulations stated that, in the event of dismissal, no refund would be granted. The court held that the student's expulsion was not a breach of contract on the part of the institution; it was a reasonable exercise of the academy

superintendent's discretion. Therefore, the parent was not granted recovery of any tuition paid for the semester in which the son's disciplinary expulsion had taken place.

Concerning the right of the courts to interfere in the academy superintendent's power to determine the type and severity of punishment, the court, citing considerable precedent, stated:

> The only requirement necessary, so far as concerns a review by a court of justice of his action in dismissing Cadet Manson, is that his action shall be so unreasonable and oppressive as to warrant a conclusion that he acted maliciously, unfairly, or from some improper motive, some motive other than the proper enforcement of the regulations of the academy and the maintenance of proper discipline. Koblitz v. Wes. Res. Univ., 21 Ohio Cir. Ct. 144, Curry v. LaSalle Sem., 168 Mass. 7. Fessman v. Seeley, 30 S.W. 268, Kabus v. Seftner, 34 Misc. (N.Y.) 538; Horner School v. Wescott, 124 N.C. 518. (pp. 255-256)

The claim that the institution had first abandoned the contract was also used in another Illinois case. The Illinois Appellate Court, in McClintock v. Lake Forest University (1921), cited Manson v. Culver Military Academy (1908) in ruling that a student was entitled to recover the tuition he had paid. In this case, McClintock, who had paid the first semester's tuition in advance, had been sent away by the school headmaster before school started for violating an honor code by allegedly smoking in the local village before he even became a student. Two student council members observed two other new students smoking, and these two

students accused McClintock also. When accosted, McClintock denied smoking, but admitted he had seen the other two smokers. He was informed by the two student council members that not reporting this incident was tantamount to breaking the honor code, and they advised him to go home before automatic expulsion resulted the following day.

The next day, the headmaster confronted McClintock and, in the course of the disciplinary process, agreed that as soon as another student took his place, McClintock's tuition would be refunded. However, when subsequent students came, the headmaster did not refund the money. In fact, the school kept the money of all three new students accused of smoking. McClintock sued for the promised refund, and the school countersued for the entire year's tuition. The appellate court commented that, in ruling for plaintiff McClintock, the jury in the original case "may have been shocked by the peculiar ethics which prevailed at this Academy, . . . [by] the penalty [that] was so disproportionate to the offense" (p. 476), and by the "twisted and peculiar" honor system (p. 477). Apparently, the jury had felt compelled to interfere in this expulsion on the student's behalf because the school "was not activated by proper motives" (p. 478). The improper motives and oppressive behavior of the school had brought this case under the court review requirement stated in Manson v. Culver Military Academy (1908). The Illinois Appellate Court upheld the inferior court's decision for McClintock on

the grounds that since Lake Forest University had abandoned its contract with McClintock, the student could also disaffirm his contract and sue for a refund as if the contract had not existed (p. 473).

In another case where the expulsion was unreasonable held to be and without just cause, the City Court of Buffalo upheld the student's right to recover tuition. In Miami Military Institute v. Leff (1926), Leff, a Jewish student, was expelled when he refused to attend mandatory weekly Protestant church services in the school's community in compliance with very general terms stated in the school's catalogue. While the student willingly complied with the daily chapel requirement on campus, he refused as a matter of conscience to attend the Protestant services off campus, but instead offered to attend Jewish services in a nearby town at his own expense. This offer was rejected, and Leff was expelled after less than 2 weeks in school. The school filed suit for the tuition for the remainder of the year. Leff's father filed a countersuit against the school for recovery of the tuition for failure to fulfill its obligations and for violation of religious freedom under provisions of the Ohio Constitution.

The court carefully examined the catalogue, the basis for the contract, and found that the passage referring to church attendance seemed more like a "pleasant description" or "interesting event" (p. 806) because it was positioned away

from the section entitled "Regulations" and was expressed in such general language that it failed to convey the mandatory nature of the requirement (p. 806). Since there was a "lack of material understanding" (p. 807), the contract on which the school based its expulsion was not enforceable. Because the school's expulsion was without just cause, the school had breached the contract, forfeiting its right to any compensation.

Miami Military Institute also was found guilty of violating Leff's Ohio constitutional rights to freedom of religion. While upholding the general principle that mandatory chapel as part of the school's curriculum or instruction was reasonable, the court described the school's requirement for mandatory church attendance at places "independent of the school itself, and located outside its boundaries and beyond its authority and control," (p. 888) as unreasonable.

Three other kinds of situations also gave rise to student victories in tuition disputes. In the first of these situations, represented by Brown v. Search (1902), the institution was shown to have established a contract based on a fraudulent promise by its agent. Therefore, the Wisconsin Supreme Court ruled that Search's parents were allowed to rescind the fraudulent contract and pay no fees. The same reasoning was cited to uphold the student in Aynesworth v. Peacock Military Academy (1920).

In the second kind of situation where a refund was granted, the Court of Civil Appeals of Texas upheld the jury's application of an oral contract in Texas Military College v. Taylor (1925). In this case, the jury determined that sufficient evidence was given to support an asthmatic student's claim that an oral contract was established in which he was promised a refund upon withdrawal if his physical health would not permit him to remain in school for the entire semester. Applying this oral contract to avoid the extremely harsh effects of the written contract, the court granted the student a proportional recovery of fees for tuition and board.

In the third situation where a student prevailed in a tuition dispute, the courts chose to read the terms of the contract as literally as possible. The first was an old North Carolina case, Horner School v. Wescott (1899), where the catalogue said that no money would be refunded in the event of an expulsion. Since it did not specifically state that the student must pay all of the semester's tuition in the event of an expulsion in the middle of the semester, the court held that a student, who by special arrangement had paid only a part of the semester's tuition at the time of his expulsion, was not liable for tuition for that part of the semester which he did not attend.

Two other related cases involved military academies previously mentioned in other litigation, Rogers v. Councill

(1924) and Culver Military Academy v. Staley (1928). Representative of the cases involving military schools was the suit initiated against Councill for unpaid tuition by Peacock Military Academy. In this instance, Councill enrolled in the academy, but he deserted the school in less than a month at which time the school sued for the session's unpaid tuition. The Peacock Military Academy catalogue stated that the parents were liable for tuition in the case of suspension, expulsion, or withdrawal without cause. Strictly interpreting these contractual terms, the Court of Civil Appeals of Texas found that since the school presented no evidence to indicate that the runaway student had been suspended, expelled, or withdrawn without cause, there was no basis for the school's claim for the unpaid tuition (p. 208). In explanation, the court commented that

> the contract is very harsh and rigorous in its terms, and should not be enforced without proof bringing the withdrawal of the boy from school strictly within the terms of the contract. (p. 208)

Several kinds of situations, however, were clearly recognized by the courts as reasonable causes for the legal expulsion of the student: failure to meet academic standards, disruptive behavior or violations of disciplinary codes, and immoral or unethical behavior. People ex rel. Walter Jones v. The New York Homeopathic Medical College and Hospital (1892) was an early case which represented the first of these approved kinds of dismissals. In this case, the New

York Supreme Court ruled that if the school deemed Jones academically unqualified to graduate, the courts would not interfere with the school's decision. On the other hand, when the school authorities could not agree among themselves on the student's academic qualifications, the court did interfere on behalf of the student (State ex rel. Nelson v. Lincoln Medical College, 1908).

Commission of such disciplinary offenses as hazing and ringing cowbells (John B. Stetson University v. Hunt, 1924), truancy (Fessman v. Seeley, 1895), smoking and disorder in the assembly (Teeter v. Horner Military School, 1914), smoking in public and sitting on a young man's lap in an automobile (Tanton v. McKenney, 1924), and serving liquor in the student's home (Ingersoll v. Clapp, 1928) were seen as justifiable dismissals. Unethical behavior such as lying and trying to incriminate another student (Goldstein v. New York University, 1902) or using knowledge gained in legal education to avoid paying one's just debts (White v. Portia Law School, 1931) also were held not to be arbitrary.

Even impairment of the highly valued freedoms of religion and free speech was allowed when the court interpreted the implied terms of college disciplinary regulations to include limitations of these rights. As previously mentioned, during the First World War when the nation was alarmed over sedition and dissent, Columbia University was upheld in the expulsion of a student who participated in unpopular anti-war speeches

off campus where he prophesied revolution and said he hated the "American Kaiser" more than the German one (Samson v. Trustees of Columbia University, 1917). During that same time frame, Albany Law School was upheld in the expulsion of a law student who was alleged to have had socialistic beliefs (People ex rel. Goldenkoff v. Albany Law School, 1921). Even the advent of another era did not alter the court's tendency to side with the institution. In a later case, Robinson v. University of Miami, 1958), the university's expulsion of a student from a student teaching program required for a teaching certificate was upheld because the school felt the student's fanatical atheistic beliefs were so strong that he would communicate them to and adversely influence his students.

Anthony v. Syracuse University: The Waiver and Reservation Clause Era

One of the most famous and influential decisions regarding contractual rights of students from the early 20th century was another New york case, Anthony v. Syracuse University, 1928). Germano (1979) asserted that this pivotal case "may have marked, in the case of the public and private school and college, the beginning of the sublimation of the doctrine of in loco parentis" (p. 80). In reality, this case represented the culmination of a gradual departure from in loco parentis and the emergence of contract as the definitive characterization of the student-university

relationship. This new contractual characterization of the relationship was more compatible with the changing currents of American life in the "Roaring Twenties," more reflective of the Progressive collegiate agenda which continued to promote student self-government and responsible democratic citizenship, and more in step with the renewed focus on business and individual iniative. Furthermore, it permitted the court to clearly describe the relationship as one of implied contract or contractual in nature, yet construe the contract to reflect its traditional deference to paternalistic university authorities.

In this case, Anthony was dismissed during her senior year at Syracuse University for no reason other than that it was rumored at her sorority that they did not consider her a "typical Syracuse girl." Anthony, refusing to accept her dismissal, sued, basing her right to readmission on implied contract. The court agreed that she could recover only on the basis of contract, since the relationship between a student and a private institution was purely contractual.

Syracuse University presented evidence that, upon matriculation, Anthony had signed a waiver which stated that the institution was authorized to withdraw any student at any time, for whatever reason, and without stating a reason, "in order to safeguard those ideals of scholarship and that moral atmosphere which are the very purpose of its founding and maintenance" (p. 438). Although Anthony argued that she had

not read the catalogue, that the regulation was against public policy, and that she had been an infant when she had signed it, the New York Supreme Court dismissed the arguments as unsound and upheld the institution (p. 439). The court left no doubt that private school students could contract away any rights they had by signing reservation clauses which formalized the university's right to dismiss students. The court further stated that the burden of proof of breach on the part of the institution rested on the student to show that the dismissal did not fall within the waiver conditions (p. 440).

The Anthony (1928) decision at the state level was not inconsistent with the principles of laissez faire first expounded by the U. S. Supreme Court in Lochner (1905). Between 1921 and 1933, the U. S. Supreme Court in reaction to Progressivism had returned to laissez faire. Anthony (1928) case was also consistent with the U. S. Supreme Court's education decisions in Pierce v. Society of Sisters (1925) and Meyer v. Nebraska (1923), which upheld the autonomy of private schools from outside interference.

The Student and the University in the Post-Anthony Era

In the years after Anthony v. Syracuse University (1928), certain attitudes and beliefs about what the idea of a university meant and about the relationship between the student and the college or university became an integral part

of the higher education scene. Educators continued to be preoccupied with the idea of the university and the role of knowledge in society as the country entered the Progressive Era, the Depression, and engaged in World War II. As the collegiate era of education gave way to the university era, parallel changes occurred in the status of students. The era in which students were protected and disciplined as wards of a church-dominated, paternalistic college was replaced by the university era. In the university era, students were increasingly viewed more as independent adults who bore responsibility for safeguarding their own rights and general welfare. In their emphasis on scientific research and the independent search for truth, university officials placed scholarly research and publication and not students at the center of academic life. As beliefs and attitudes about the status of students changed, the more impersonal and business-oriented university leaders supported the use of contract doctrine rather than the collegiate-inspired in loco parentis characterization of student-university relations.

During the post-Anthony era, in conjunction with the traditional in loco parentis doctrine, contract doctrine became a familiar and accepted part of the legal conceptual framework regarding student-university relations. Despite continuing criticism for its rigidity and skepticism about the strict application of the commercial law of contracts to the student-university relationship, after Anthony (1928),

contract theory "firmly established its credentials with the courts" (Ray, 1981, p. 169). As a result, judges who were influenced by new beliefs and attitudes and by gradual changes in jurisprudential approaches were relatively consistent in their approach toward contract litigation for the three decades following the Anthony (1928) decision.

Student Legal Status in the Aftermath of Anthony (1928)

After Anthony v. Syracuse University (1928), the university's right to use waiver and reservation clauses severely limited students in their efforts to seek redress through actions for breach of contract. To safeguard their broad powers to exercise discretion, most institutions of higher education quickly added to their catalogues waivers fashioned after the one sanctioned in Anthony (1928). Through this action, the fate of most subsequent student court actions was virtually sealed. Hence, for the next three decades, few cases were presented to the courts on student claims of breach of contract, and the few that were presented had poor success. In the space of four decades, the pendulum had swung almost completely over to the side of the institution. The typical court, while espousing a policy whereby dismissals which were deemed arbitrary, motivated by bad faith, or derived from improper motives would be actionable, in reality, did not support this kind of policy. As a student commentator ("Comment, Private Government on the

Campus," 1963) remarked, "once, the court ha[d] seized upon the contract analogy, it acted as if it were driven to finding for the college" (p. 1377).

This trend did not change until after World War II when higher education institutions were flooded with a large number of diverse students, many of whom were returning veterans supported by the "G.I. Bill." These student-veterans were older, more cognizant of their rights, and more inclined to question the university's untrammeled authority over students. Close on their heels was another generation of disenchanted youth and other veterans who actively sought involvement in social and political change and to whom deference to academic traditions and values was alien.

At about the same time that American college campuses were rebounding from the great influx of World War II and Korean War veterans, the courts had begun moving in a new direction. The 1930s had brought in a new approach to law called "realism". This approach, according to Llewellyn (1930), was that in reality judges were not bound by rules or anything else in determining cases. Frequently, judges intuitively chose among rules where several applied, and often when no rules were applicable, they exercised discretion and "plowed new ground" in determining cases. In doing this, they essentially became makers of public policy. He suggested that much jurisprudence did not operate as described by previous theorists who believed that facts were

presented, the judge determined what law applied in the case, and then applied it to the case at hand. As students and formulators of jurisprudence began to acknowledge the discretionary aspects of law, the traditions of academic abstention and judicial restraint gradually became less sacred. Indeed, the era of judicial non-intervention in education came to an end when the U. S. Supreme Court made its landmark decision in the school desegregation case, Brown v. Board of Education of Topeka (1954). While this case concerned elementary and secondary schools, the precedent soon was applied as well to postsecondary education. The cessation of contract litigation against the university by students ended as the courts once again began to focus on student rights.

The University's Search for a Unifying Philosophy in the Post-Anthony Era

The confused state of American higher education in the middle of the 20th century was similar to that which had existed about 100 years earlier. Members of competing groups held conflicting ideas about the purposes of education and how these purposes could best be accomplished. In the century that had passed, some old questions had been answered, but new questions were generated as a result of the advent of the university. Leaders of higher education were still in search of a consistent unifying philosophy. Much of this conflict had resulted from efforts to reconcile the

American version of the German research university, dedicated to advancing the boundaries of knowledge through scholarly research and publication, with the more egalitarian and utilitarian service-oriented university, dedicated to training large numbers of students to satisfy the vocational and technological needs of American industry.

Such notable educational figures as Abraham Flexner, Robert Hutchins, John Dewey, and Edmund Williamson were among those who sought a unifying purpose and philosophy for higher education in the post-Anthony era. Both Flexner (1930/1961) and Hutchins (1936/1961) harshly criticized the American university for its triviality and excessive emphasis on vocationalism, to the exclusion of intellectual development. Hutchins led the crusade for a rationalistic philosophy which upheld the superiority of liberal education over vocational studies. To Flexner and Hutchins, the principal role of education was intellectual, not utilitarian or moral. In contrast, Dewey (1916) upheld pragmatism as the appropriate unifying philosophy for education. Dewey (1937) harshly criticized Hutchins's elite and impractical desire to divorce intellect from practice and experience and called for a marriage of theory and practice.

While Dewey saw the principal role of education as confronting problems by formulating theories and testing them in the real world, Williamson (1939) saw the role of education as developing the "whole student" by placing the

student at the center of all aspects of college life. Followers of Williamson's student development movement, reacting to the impersonal, intellectualistic approach borrowed from the German universities, called for education to exist for the sake of the curricular and extracurricular concerns of its heterogeneous student population and not for the acquisition of knowledge for its own sake. They focused on the student's total personal development. They also attempted to unify the scholarly side of college life with the extracurricular side which had become in many cases the primary motivating force of the majority of students after the middle of the 19th century.

While the educational debate continued, serious cross currents also were developing among students, faculty, and administrators. Widespread tensions between students and academicians, which previously had been ventilated in riots throughout the first half of the 19th century, manifested in a new way. For the most part, undergraduate students rejected the values and beliefs of both faculty and administration. The unity of purpose and cohesiveness typical of the church-dominated college era gave way to an extracurricular college life in which students essentially ignored university officials. In tune with the spirit of the expansive, utilitarian age, the undergraduate student was more interested in social advancement and social activities

and quite inclined to favor mediocre academic performance (Veysey, 1965).

Professors and academic administrators alike were generally rebuffed by this new breed of upwardly mobile students. Serious academicians felt that the student who sought status and fun was not one who belonged in the seminars and research laboratories of the intellectually elite graduate schools. Likewise, this student was not likely to delight the hearts of university-trained instructors who fervently wished to convey their love of the world of abstract ideas. Indeed, there was little communion between the student and the professor and even less between the student and the academic administrator.

The practical public university academic administrator, in order to receive public funding and continued support of a public board of directors, had to deal with a demanding public that wished to see its children move up the social ladder and its technological needs met through the vehicle of higher education. In a similar manner, the graduate school academic administrator continuously had to answer to private benefactors or seek other support by making the political rounds to curry favor and win support for the university's expensive and elite programs. As a part of this environment, the student, in youthful exuberance, felt additional isolation from an impersonal academic administrator viewed as an overbearing agent of control. Likewise, the faculty felt

alienated because its front line of defense from the outside world, the administrator, was more interested in politics than Plato.

These compromises within the university, along with the fragmented efforts of the university to define itself, were a source of divisiveness and discontent throughout the entire university community. Ultimately, these underlying feelings of isolation, alienation, and fragmentation were vented in a variety of ways. The frustrations of administrators were often expressed in their struggles with students over discipline and with faculty over academic freedom. Faculty members expressed their discontent in confrontations with administrators over loyalty oaths and violations of due process and with students over academic malaise. Students communicated their feelings of alienation from faculty and administration in their ambivalence toward scholarly pursuits and in their persistent belief that internal university mechanisms were ineffective in safeguarding their rights and promoting their best interests.

Resolution of these cross currents was not accomplished as American education moved into a new era after World War II. Gradually, the pendulum swung away from student apathy and complacency and ushered in an era of student activism which shocked the members of colleges and universities and pushed society into a major social revolution. During the 1960s, riots and student demonstrations occurred at campuses

across the country, and students turned to the courts in record numbers to express their distrust in an educational system they felt was not serving them well. In this new era, students felt it possible to turn to courts with an expectation of receiving redress for injustices in their relations with the university.

Summary

Many members of all ideological groups within American society at the turn of the 20th century agreed that anything which encouraged the artificial aristocracies and bloody class warfare of Europe posed a threat to American democracy. What they could not agree on was the identity of those who were leading America to destruction, for both industrialization and urbanization had left serious problems in their wake. The advocates of laissez faire held that those who opposed self-reliance, energy, and enterprise and wished to use artificial political means to control rugged individualism were the enemy. To laissez-faire supporters, natural law dictated that those who seized opportunities, worked long hours, and overcame obstacles survived and became wealthy. In doing so, they advanced the nation's technology and provided leadership to corporations which increased the material wealth of the expanding population, eliminating the need for class warfare. According to its advocates, democracy would thrive under laissez faire, and in varying

degrees everyone would benefit: the entrepreneur, the worker, the nation.

In contrast, Progressives saw the enemy as the selfish, decadent, materialistic robber baron whose vision for America was as selfish as the feudal aristocrats who were destroying Europe. As products of natural law, these robber barons created either good or bad trusts. Theodore Roosevelt, the first Progressive president, called on the virtuous industrial giant to uphold democratic ideals by placing national interest above self interest. Likewise, he asked American citizens to follow the example set by the good soldier who subordinated individual concerns to those of the community for the collective good of society (Noble, 1970).

According to the Progressive, if extremes were not avoided, government was obligated to serve the cause of progress through government interference in private business: regulation and discipline of illegal trusts or monopolies, protection of consumers and workers, and preservation of the nation's natural resources. According to advocates, under Progressive leadership, democracy would flourish, and in varying degrees everyone would progress: the responsible business leader, the worker, and the nation.

Advocates of Progressive reform and supporters of laissez faire were both advocates of capitalism. The Progressive spirit, however, called for responsible business practices tempered by idealism and devoid of aristocratic arrogance and

selfishness. To Progressives, the end determined the means. If regulation was the only way to insure that uncontrolled capitalism did not diminish the rights of the average citizen, demoralize the worker, and undermine the democratic process, then, for the sake of democracy, government controls must be implemented. To laissez-faire proponents, including many members of the bar and bench, the affront to constitutional rights in the form of government controls was an unnecessary encroachment on individual initiative, individual liberties, freedom to contract, and an enfringement of due process rights.

This critical difference of philosophy was the cause of much frustration to Progressive reformers, Roosevelt, Taft, and Wilson, and resulted in the U. S. Supreme Court's nullifcation of much of the reform legislation throughout the Progressive Era and the New Deal. While the reformers were willing to subordinate individual rights in order to protect the nation's interests, the U. S. Supreme Court was willing to justify judicial activism and legislation from the bench. The expansion of the due process clause of the 14th Amendment to include corporations was the most noted example of the creation of judicial public policy. The creation of the "rule of reason" distinguishing between good and bad trusts was another example.

The U. S. Supreme Court was faced with few instances of government interference in business during the

administrations of Harding, Coolidge, and Hoover because officials in these administrations agreed that the business of America was business. However, the court renewed with excessive vigor its commitment to protection of business and the liberty to contract when Franklin Roosevelt within 100 days pushed his first New Deal reform package through Congress. While the nation was in a state of emergency and the economy was in shambles, Roosevelt's New Deal shocked the "bench" throughout the nation so much that some felt that democracy was being delivered into the hands of a dictator. As soon as the first cases reached the U. S. Supreme Court, the court immediately began putting restraints on the extent to which the president could use presidential power and the legislature could delegate it.

By 1936, Roosevelt realized that the courts at the state and federal level were intent on dismantling the entire New Deal and that subsequent legislation had little chance of passing without a curb being placed on the judiciary. Roosevelt proposed a new law reorganizing the courts so that "new blood" with less conservative attitudes could quickly be added to the bench. This proposal failed; however, the U. S. Supreme Court began to modify its decisions, meeting Roosevelt on middle ground. By 1941, the New Deal had run its course, and Roosevelt had been able to appoint many new federal judges and re-constitute the Supreme Court because of the deaths and retirements of the chief justice and seven of

the eight associate justices. The new court was much more agreeable to government regulation of business and industry.

Accustomed to a long period of previous judicial activism, the new court selected by Roosevelt turned its attention to preventing state and federal government encroachment on freedom of speech and religious and civil rights. Missouri ex rel. Gaines v. Canada (1938) was the first of several cases concerning segregation at state universities. In this case, the court ruled that the University of Missouri had to admit Gaines, a black man, to its law school because, as a citizen of the state with no other viable alternative, he was constitutionally entitled to admission. This case was an indication the court's willingness to break with the tradition of heretofore leaving education strictly to the state and local government.

The state courts did not change their characterization of the student-university relationship because of Gaines (1938) and other civil right cases relating to education until the U. S. Supreme Court established precedent in the 1960s. As they had since the turn of the century, the state courts before World War II continued to view the relationship as either paternal or contractual in nature. Furthermore, they maintained that judicial interference was a violateion of the institution's right to conduct business and exercise discretion in regulating students, provided, of course, the higher education institution exercised reason when defining

or curtailing student contract rights. The policy of non-intervention on the part of the courts had begun in the 1890s, but only a few contract cases had been heard until after the turn of the century. Beginning with Koblitz (1901), state courts across the country began to clearly outline the obligations incurred by both parties to the contract.

In essence, Koblitz (1901) explained in contract terms the in loco parentis customary discretion practiced by colleges since colonial times. The court clearly established that Koblitz, who was expelled for disciplinary and academic reasons without formal due process, had agreed to submit to the authority of the university in disciplinary matters, including expulsions, when he entered into the contract and agreed to its implied terms. Citing the old Dartmouth College decision, the court further indicated its unwillingness to intervene in the private school's exercise of discretion as long as the college was shown to be acting in a reasonable manner. This distinction between the extent of court intervention permitted in contract disputes in private as opposed to public institutions established a precedent for future cases. A case the following year, Goldstein v. New York University (1902), also upheld the institution's implied right to expel a student, when, in its discretion, the student was guilty of behavior "subversive to

the discipline of the school" or showed himself to be "morally unfit" (p. 740).

In another case at the turn of the century, the court in Booker v. Grand Rapids Medical College (1909) refused to violate legal tradition and use mandamus to compel the college to re-admit for the subsequent year black professional students who were in good standing at the end of the first year. However, this court did enunciate restraints on the college's authority to terminate the enrollment of students when the college exercised discretion in an arbitrary manner.

Various other courts in subsequent contract disputes enunciated instances under which it would interfere with the college's exercise of discretion. Usually these instances were couched in terms of abuse of discretion or actions taken arbitrarily or in bad faith. Generally, these special exceptions could be embodied under a minimum standard requiring reasonableness, but essentially, "reasonable" remained largely undefined. Students who depended on it were provided little meaningful assistance in their suits against colleges or universities. Indeed, the "cards were stacked" heavily in the institution's favor just as they had been under the traditional in loco parentis characterization of the relationship.

While suits focused on expulsions had far more serious repercussions, suits over tuition were more common, and

students prevailed in court more often. In tuition disputes based on contract, the courts first used the "all or nothing" principle set forth in Kabus v. Seftner (1901) and upheld in William v. Stein (1917). Under this principle, the student either owed nothing or owed for the entire year; there was no proportional recovery of tuition. In disciplinary and academic expulsions, this rule was generally applied; however, in other situations where the student left school for illness, never actually attended, or returned home shortly after the beginning of the term, the courts interpreted the contract in different ways to permit the student to maneuver around his contract and not be held liable for the full year's tuition. In cases where the school violated the religious rights of the student (Miami Military Institute v. Leff, 1926) or the contract was based on fraudulent claims (Brown v. Search, 1902), the student also prevailed.

In the 1920s, instead of the colleges depending on judicial deference, colleges began to include expressed terms in their catalogues which reserved to colleges the right to expel students for some vaguely defined reasons, often without having to declare the reason. In Anthony v. Syracuse University (1928), the court upheld the expulsion of a student from a private college for very vague reasons. Because the student had signed a registration card which permitted the university to expel students and because the

expulsion came under one of the two stated general provisions for dismissal listed in the catalogue, the school was upheld. The court held that the university was not obliged to reveal this reason as long as it had one. Essentially, according to Kaplin (1978), "the institution was given virtually unlimited power to dictate the contract terms, and the contract, once made, was construed heavily in the institution's favor" (p. 6).

The court's ruling in Anthony (1928) brought a halt to litigious activity on the part of students in the decades to follow. Judicial deference to college and university authority discouraged students from taking their disputes with public and private colleges or universities to the courts because they felt the courts provided them with little meaningful recourse. Underlying feelings of isolation and alienation from faculty and administration intensified students' beliefs that members of higher education institutions were indifferent to their rights and ineffective in helping them with their problems. Student reluctance to sue for breach of contract and student complacence in academic matters did not change dramatically until the social revolution of the 1960s.

CHAPTER 6
HIGHER EDUCATION FROM 1950 TO THE PRESENT: THE INFLUENCE OF RAPID SOCIAL CHANGE, THE WARREN COURT'S ACTIVISM, THE STUDENT MOVEMENT, AND THE CONSUMER MOVEMENT ON STUDENT CONTRACT LITIGATION

> You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact logical conclusions. Such matters really are battlegrounds where the means do not exist for determination that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place.
>
> (Holmes, 1897, p. 457)

At the end of World War II, the United States entered the atomic age, another great period of unprecedented change comparable to the one at the end of the Civil War 80 years earlier. Change occurred rapidly and accelerated at a shocking pace. Erik Erikson (1968) characterized periods of difficult, often traumatic adjustment which transpire when individuals move from one stage of development to another as identity crises. Adopting this terminology, Link, Coben, Remini, Greenberg, and McMath (1981, p. 896) suggested that during the tumultuous postwar period, American society was

suffering from a national "identity crisis." The authors contended that the post-New Deal liberal consensus which began to fragment in the late 1950s resulted in the onset of a lengthy search for identity that was painful and not without enduring cost to the nation. Link et al. (1981) presented this analysis of the situation:

> In the United States, the combined impact of the social, economic, geopolitical, and scientific-technological changes produced a series of transformations so sweeping that they left many Americans with a sense of discontinuity with their own past. Ironically, the shock of historical change seems to have diminished the ability of individuals to see their own lives as a part of a continuum in which the past, present, and future are part of one social process. It is now more difficult than ever before to view "the future as history." (p. 854)

The national search for identity and the related frustration and conflict generated by attempts at understanding and adjusting to rapid transitions caused the nation to experience continuous fluctuations in mood and direction. As American society moved rapidly out of the atomic age and into the highly technological information age, the continuing process of reshaping and restructuring American institutions to accommodate changing values and complex contemporary needs provided the historical link from past to present to future. As the post-war consensus unraveled, the unifying "social constant of change" (Miller, 1979, p. 15) was at times no more apparent to the ruling "Liberal Establishment" than it was to conservatives.

Ironically, both groups for different reasons felt concerned about Communist infiltration of high government positions and radical challenges to established moral and ethical standards.

Many Americans from both political parties were equally shocked and bewildered at the "Warren Court's" recognition of civil rights and its expansion of individual civil liberties. Those who were adversely affected by the student movement's use of violence and disruption in its crusade against war, social injustice, and university tradition also failed to see much that associated these actions with traditional American ideals. Conversely, the sensitivities of such social justice champions as Associate Justice William O. Douglas and Hubert Humphrey, such student radicals as Mario Savio, and such civil rights activists as Martin Luther King were equally as shocked by the old order's indifference to or complete rejection of reform.

McCarthyism in the 1950s, the assassinations of John F. and Robert Kennedy and Martin Luther King and the violent social and political upheavals in the 1960s, the Watergate affair and hostage crisis in the 1970s, and the "Reagan Revolution" and its scandals in the 1980s produced national shockwaves decade after decade. These events, and wars in Korea and Vietnam, forced the nation to re-examine its commitment to democratic ideals and civil rights and scrutinize White House commitment to truth, decency, and

ethical standards. Moreover, recurring challenges to constitutional authority and increased demands for individual rights and consumer rights placed the courts increasingly in the limelight.

After World War II, legal battles proliferated, and state and federal court dockets became crowded with the cases of litigious Americans. The court contests waged between students and higher education institutions in the postwar era were a part of the broader picture of increasing public disillusionment with large, impersonal bureaucracies that ignored moral principles and the individual rights of citizens or violated basic principles of fundamental fairness. Associate Justice William Douglas (1980) commented on this trend:

> The work of the court always mirrors the worries and concerns of people of a particular age. Since World War II, individual rights have been more and more in balance--as a result of racial tensions, the demands of religious minorities, the trend to conformity and the accompanying revolt, the search for ideological strays in the loyalty and security hearings the Cold War and the mounting list of its victims, and many other factors related to the growing power of government and the growing importance of the individual. (p. 52)

To set the context for the ensuing discussion of parallel changes in student-university contract relations, the effect of technological change on social change, and in turn the effect which social transformation has had on the law and education requires additional attention to four periods.

These distinctly different periods of change roughly correspond to the four decades since World War II. Special attention is also given to the unprecedented increase in legal activism on the part of college and university students in the mid-1970s.

The 1950s: The Silent Generation

The first of these periods began at the end of World War II and ended with racial violence and the assassination of John F. Kennedy in 1963. Like all wars, World War II produced serious, complex changes in America and its people. As a "key player" in the allied victory, America proudly but uncomfortably assumed a new role as leader of the free world. This new responsibility was not without financial, political, and social costs. As the "Cold War" escalated in Western Europe and Asia after the war, America was soon faced in rapid succession with the Berlin crisis in 1948, the China crisis in 1949, and the Korean crisis in 1950. The world's political instability and the constant threat of war or Communist domination left Americans anxious and shaken. Furthermore, the battered free world looked to America for leadership and financial assistance.

The Cold War

Shortly after the end of World War II, Truman had abandoned all further efforts to collaborate with the Soviet

Union and initiated a policy to contain Communism. The first serious clash with the Communists began in Berlin in 1948 and ended a year later when the Soviets relented and lifted the Berlin blockade in May, 1949. On the Asian front, however, the Soviet Union was more successful in the escalating Cold War between the West and the East. In 1949, China fell to Chinese Communists who had allied themselves with the Soviet Communists. In 1950, South Korea was invaded by the Communist forces from North Korea, and a full-scale war began with American forces supporting the democratic government in South Korea.

By the end of that war, the overwhelming majority of Americans agreed that containing Communism was the most important issue facing America in the 1950s. Revelations by Whittaker Chambers, an ex-Communist and senior editor at Time, that he and his co-conspirator Alger Hiss, a post-New Deal liberal U. S. State Department senior official and former law clerk for Oliver Wendell Holmes, had sold American secrets to the Soviets, did little to instill confidence that the "Liberal Establishment" could withstand Communist influences. Because such esteemed persons could fall victim to Communist influences, Americans agreed that, when necessary, stringent methods could be employed to deal with the Communist threat. The public therefore welcomed the emergence of Senator Joseph McCarthy as the leader of the drive to purge America of all Communist influences.

Embarrassed liberals could do little to curb McCarthy's excessive assault on individual and civil rights.

McCarthy began his Communist hunt by claiming to possess a list of 205 Communist infiltrators in the U. S. State Department. The convictions of Alger Hiss and the Rosenbergs for subversion increased the hysteria. McCarthy's scare tactics lead the U.S. Congress to join his campaign against the Communist menace in 1950 by creating the Subversive Activities Control Board over President Truman's veto. Shortly after, states began to devise similar "litmus tests for such things as loyalty, security, and Americanism" (Morison, Commanger, & Luchtenberg, 1964, p. 682). Ultimately, McCarthyism led to investigative excess, flagrant disregard for constitutional rights, and widespread fear and suspicion (Schlesinger, 1983/1986).

During McCarthy's time, political liberals, intellectuals, creative artists, media representatives, and the university community were intimidated. They saw countless career diplomats, esteemed scientists, and respected writers and scholars fired or discredited. University professors were denied the academic freedom to openly discuss and debate Communism (Schrecker, 1986). Celebrities and ordinary citizens alike were unable to withstand accusations and innuendo about their socialistic beliefs or past associations with the Communist Party or its sympathizers. Liberals and social critics were silenced.

The nation grew silent, and a counter political movement emerged.

As a result of McCarthyism, the nation drifted philosophically toward suppression of radical ideas and intoleration for nonconformity. In this cultural climate, the conformist became the respected role model for youth. Indeed, most of society became what sociologist, David Reisman (1950/1978) described as "other directed," a condition in which "conformity is insured by [a person's] tendency to be sensitized to the expectations and preferences of others" (p. 8).

Taking their lead from the "Silent Generation" of the 1950s, students were equally reluctant to take strong political stands, question the status quo, or emphasize their individuality. After college, they too became "status seekers" (Packard, 1959) or "organization men" (Whyte, 1956) in large companies. Many allowed the mass media and "Madison Avenue" to dictate appropriate styles, beliefs, and attitudes. Following the established path to peace and prosperity, the majority of students accepted and supported the same set of assumptions as their parents. Handlin and Handlin (1971) characterized the complacent "father-knows-best" student culture in the following manner:

> Not willing consciously to take chances, the young people avoided deviation from established patterns. Their minds ran to motorcars and suburban bungalows. As students, they read thoroughly what was assigned them, but were unadventurous and

> shied away from heresy. In discussion, they were eminently docile.
>
> Partly they conformed because it was dangerous not to. They believed that those who dealt out the office space in government and industry were not likely to discriminate among types of radicalism, that every heterodox idea reflected a red glow. Still, they did not object against the pressures toward like-mindedness. (pp. 253-254).

The Warren Court

While government in the 1950s did little to combat suppression of individual rights and society immersed itself in the anxiety of "other-directed adjustment" (Reisman, 1950/1978, p. 57), the U. S. Supreme Court began to assume a new role. The high court edged into the postwar political storm and emerged as the foremost protector of individual and civil rights in 1954. The reshaping of the American constitution and the American conscience began under the strong leadership of Earl Warren.

Shortly after his appointment as chief justice, Warren made history when he wrote the unanimous court decision in Brown v. Board of Education of Topeka (1954) in which he said that separate but equal schools for black children were inherently unequal. The Brown decision overturned the high court's previous opinion on segregation in public schools and marked a major turning point in the fight for civil rights. This ruling marked a departure from the court's usual deference to education officials and longstanding tradition

of judicial restraint with respect to interference with the states' right to determine educational policy.

The Warren Court also saw the need for protecting the individual rights of unpopular radicals and those whose beliefs or actions put them on the fringe of American society. To accomplish this, the judicial activists of the Warren Court employed the guarantees of due process and equal protection in the 14th Amendment to curb intolerance and protect the civil liberties of radicals, non-conformists, and social misfits. In contrast, previous conservative Supreme Court activists in the 1920s and 1930s had expanded due process to protect business from excessive governmental intrusion and control.

As the McCarthy era ended, the Warren Court also rapidly moved to protect the academic freedom of educators and to curb the thrust of the anti-subversive agenda. Having breached its policy of deference to states in educational issues in 1954, in Slochower v. Board of Education (1956) the high court upheld a New York teacher who was fired because he had invoked the 5th Amendment when asked by the state to testify about previous Communist Party membership. In Sweezy v. New Hampshire (1957), the U. S. Supreme Court also upheld a university professor who refused to answer questions that violated his rights of free expression and political association and his opportunity to explore the entire marketplace of ideas. Again in 1966, the U. S. Supreme Court

in Elfbrandt v. Russell (1966) upheld an Arizona teacher's refusal to take a loyalty oath which would make it impossible for her to attend a conference where alleged Communists might predominate.

Meanwhile, as the country was rapidly changing to meet the "Sputnik" challenge of 1957 and still "reeling" from the civil rights revolution set in motion in 1954, neither leaders of the legislative or executive branches of government could claim to be on the cutting edge of social change. The pace setter of the social agenda and leader of the fight to provide economic, social, and political parity was the federal judiciary. The Warren Court's expansion of due process and equal protection attempted to make it possible for all Americans to receive equal treatment irrespective of their race, radical philosophy, or criminal record. Some Americans violently opposed the court's attempt at social engineering; others applauded it. However, no one denied that the nine men of the Warren Court had launched the United States into a veritable legal revolution.

The Emergence of the Constitutional Relationship

Throughout most of the 1940s and 1950s, the student-university relationship essentially had remained unchanged. Because of this, few cases had been presented to the courts between 1928 and 1961, the year when the constitutional relationship emerged. Those which had been litigated

basically did not alter the contractual relationship established in Anthony (1928).

In the interval between the court's definitive statement in Anthony (1928) and the emergence of the constitutional relationship in Dixon v. Alabama State Board of Education (1961), a few legal authorities had discussed novel approaches to the student-university relationship. For example, Chaffee (1930) had described college enrollment as analogous to membership in private associations. Seavey (1957) had introduced and later Goldman (1960) had more fully developed the idea that the college and the student were engaged in a fiduciary relationship. Hamilton v. Regents of University of California (1934) had buttressed postsecondary institutions in their "high handed" treatment of students by ruling that college attendance was a privilege and not an inherent right.

None of these novel approaches had produced a change in the courts' disposition of cases. None of them had altered the judiciary's hesitance in interfering in institutional affairs unless a flagrant abuse of institutional discretion could be shown by the student. The courts continued to show deference to the institution in spite of the fact that such deference was contrary to the common practice in commercial contract law of placing the burden of proof on the accused and not the aggrieved party.

In 1960, black students at Alabama State College turned to the federal courts for redress from expulsions resulting from their participation in civil right demonstrations off campus. In Dixon v. Alabama State Board of Education (1960), the U. S. District Court for the Middle District of Alabama, following the conservative court view expressed in Anthony (1928), supported the institution's right in disciplinary cases to dismiss its students without due process. The students appealed the decision. In the appellate case, Dixon v. Alabama State Board of Education (1961), the U. S. Court of Appeals for the Fifth Circuit reversed the lower court and held that the students were constitutionally protected from the college officials' failure to grant them their due process rights. Following the Warren Court's lead in guaranteeing constitutional rights to all citizens and reflecting the view of Seavey (1957), the Fifth Circuit Court of Appeals expressed the belief that if the blessings of liberty and constitutional safeguards protected pickpockets, then certainly students deserved no less. The Dixon (1961) decision was a significant alteration of the established student-university relationship and marked the emergence of the constitutional relationship for students in public colleges and universities. These constitutional rights supplemented previously recognized and accepted contractual rights.

The U. S. Supreme Court refused to hear the Dixon (1961) case on appeal, thereby allowing the Fifth Circuit Court's decision to stand as precedent. Although the Warren Court had reviewed more 14th Amendment cases than all previous courts combined, it refused to hear Dixon (1961) or any cases concerned with a student's dismissal for disciplinary reasons (Millington, 1979). However, according to Millington (1979), the Supreme Court's "message in terms of expanded civil liberties in other areas was not overlooked by the lower courts when they reviewed student and college conflicts" (p. 39). In accordance with the federal judiciary's intent to provide students their constitutional rights, in subsequent case law lower courts identified the procedural safeguards and individual rights public colleges and universities were required to accord students.

Even though the Dixon court's 1961 ruling was based more on a concern for civil rights than on a desire to reshape the overall relationship between students and their higher education institutions, the net effect was to reduce institutional autonomy and provide a new avenue for redress for students who suffered from arbitrary disciplinary action on the part of public university officials. The Dixon (1961) decision, however, did not disturb the student-public university relationship with regard to academic dismissals, nor did it in any way disturb the student-private university relationship. This relationship essentially continued to

rely strictly on the contract provisions outlined in Anthony (1928) and updated in Carr v. St. John's University (1962), the modern root of student-university contract relations.

The Basis for Present-Day Student-Private University Relations

Shortly after the Dixon (1961) decision, Students from private universities tested their contractual rights through litigation. In Carr v. St. John's University (1962), two students at a private Catholic university were married in a civil ceremony before another student who served as a witness. Because being a principal of or witness to a civil marriage was a violation of Canon Law, St. John's University, expelled the wife and witness, who were seniors, and removed the husband's name from the graduation list. In justifying the denial of degree and expulsions, the institution relied on a clause in the catalogue which stated that students could be expelled for not upholding Christian ideals in education and conduct.

The trial court upheld the students and ordered the wife and witness reinstated and the husband placed on the graduation list. In making its decision, the trial court noted that in accordance with the decision in Gott v. Berea College (1913), the court was required only to look at whether the school authorities had reasonably exercised the power and discretion granted it. It would not consider the

wisdom of the school's regulations or its manner of dispensing punishment.

The trial court also could find no basis for any claim of constitutional protection because the institution was clearly a private enterprise unaffected by any public interest. The trial court did, however, require that the terms of the contract be explicit enough to make students aware of the kinds of misconduct for which they could be held liable and subsequently punished. On this point, the trial court held that even though the contract terms as expressed in the college catalogue were valid, the guidelines established by St. John's University were too vague and indefinite for the students to know that civil marriage specifically violated the ideals of Christian education and would result in expulsion.

On appeal, however, the New York Supreme Court, Appellate Division, reversed the trial court's decision on the grounds that the contract terms were not overly vague and indefinite. To the appellate court, reference to Christian ideals in the St. John's University catalogue was tantamount to Roman Catholic Church ideals. The appellate court concluded that the students did not claim to have misunderstood school policy nor should they have been unaware of the fact that the Roman Catholic Church viewed civil marriage as a serious violation of church law. The court therefore held in Carr v. St. John's University (1962) that, according to contract

principles, the institution was within its rights to dismiss the three students. Updating the Anthony (1928) decision, the New York Supreme Court, Appellate Division, also reiterated traditional ideas about the courts' reluctance to interfere in the relationship between private institutions and their students:

> With respect to rules and regulations for breach of which students of a private university may be expelled, courts will not consider whether they are wise or expedient but whether they are a reasonable exercise of power and discretion of college authorities. (p. 414)

According to Kaplin (1976), the court in Carr (1962) did limit Anthony's (1928) impact in the state of New York. Whereas previously the court in Anthony (1928) had viewed the exercise of institutional discretion very broadly, permitting the university to arbitrarily dismiss without even stating the reason, the Carr (1962) court insisted on the exercise of honest discretion based on a fair evaluation of the facts.

The End of the Postwar Generation

The changes in the student-university relationship due to court intervention was one aspect of the impending pervasive changes which were sweeping across American society. Peace on the domestic front came to an abrupt end in 1963 as the suppressed anger and latent violence which had periodically surfaced after the 1960 election exploded across the nation. When the "freedom riders'" fight to challenge segregated bus

terminals throughout the South arrived in Alabama, it erupted in mob violence and bombings in 1961. When James Meredith, a black veteran, had attempted to enter the University of Mississippi in the fall of 1962, violence erupted again. In Birmingham, Alabama, in the spring and summer of 1963, massive street demonstrations led by Dr. Martin Luther King again led to violent confrontation with police armed with dogs and fire hoses. Later that year, Medgar Evers, the leader of the Mississippi NAACP, and four black children attending church services were added to the list of civil rights martyrs.

As 1963 drew to a close, Americans were again stunned and horrified as many viewed the assassination of President JOhn F. Kennedy and subsequent death of his assassin on national television. This act of violence penetrated the hearts and minds of even the most apathetic American, stretching across social, racial, and age barriers. To an inspired new generation of Americans who had been challenged by the vigorous, idealistic rhetoric and youthful style of Kennedy during his 3 years as president, the myth of the New Frontier was shattered. The death of their leader left them confused and deeply troubled after his death. Soon they looked to the counterculture, the New Left student movement, and the civil rights activists for direction in their efforts to express alienation and for help in eradicating cultural disadvantage, civil rights abuse, and war. Students and minorities were

especially hard hit by the national identity crisis set in motion by the shattered dreams and increasing violence and turmoil of 1963. These two groups gave rise to a new generation of widespread social protest.

The 1960s: The Age of Social Protest and Campus Unrest

The period of social protest and campus unrest has been associated with decade from 1960 to 1970; however, the student protest movement really began after Kennedy's death in 1963. Campus unrest became a part of the American educational landscape for almost a decade after student rebellion erupted at Berkeley in 1964. It continued through the Kent State and Jackson State tragedies in 1970 and ended in 1972 when campus violence subsided due to the withdrawal of American troops from Cambodia.

Although American university students in the 1930s had formed a student movement, the early American student movement was of little political consequence, and its source of power came from outside the university, namely, the Communist Party and the Old Left. Historically, "generational conflict" (Feuer, 1969) had produced student movements of much more political consequence in Russia, China, Korea, Japan, and Latin America. Until the early 1960s, American students, however, had never been stirred to the intensity of other student movements because, like their parents, the overwhelming majority of American students had

held the same vision for America and a similar view of the student's role with respect to the university. According to Feuer (1969), few American students before 1960 had been inspired by the themes of generational revolt.

In the late 1950s and early 1960s as the postwar prosperity continued and parental expectations centered on the continuation of middle-class values and ideals, a group of young intellectuals began to worry about the world they would inherit and to question the social and economic values which undergirded it. The radicals within this group seriously committed themselves to a social revolution, some by violent means. According to the President's Commission on Campus Unrest (1970), a much larger group of liberal students within this intellectual group had grown up "in the post-Depression American welfare state under the tutelage of a parental generation that embodied the distinctive moral vision of modern liberalism" (p. 73). This moral view made clarification of values much more difficult for them. They were torn by their desire for personal status and success and their simultaneous ideological commitment to social change. The New Left, beatniks, hippies, the drug culture, and a full range of counterculture groups came out of this conflict.

As the counterculture slowly emerged, the generation gap began to widen. The attendant generational conflict which only a few radical individuals in the late 1950s had expressed began to gain broader support. Buttressed by the

Warren Court's activism on behalf of individual and civil rights, the first focus of this movement was civil rights.

The Student Movement

Students around the country in 1960 watched first with shock and then with growing admiration as southern black students in sit-ins and non-violent demonstrations began to transform their idealism and aspirations for social change into political action. While student radicals were immediately drawn to the civil rights movement, their strength in numbers was not great enough to effectively challenge either the social and economic values of the "establishment" or help topple the entrenched "Jim Crow" system. However, a sizable number of idealistic white students, whose liberal, affluent, educated parents had sent them to larger and more selective colleges and universities where they had been nurtured by liberal faculty, helped to make student power a meaningful reality. The coalition of liberal students with the student radicals and civil rights activists brought into being what came to be known as the student movement of the 1960s.

As support for the student movement broadened, the thrust of the protest grew to include a variety of campus issues. By the autumn of 1964, student militants were protesting not only poverty and social injustice, but were demanding reforms in university governance, student living conditions, and

disciplinary procedures. They were also challenging the university's achievement-oriented values and the quality and substance of the university curriculum. Moreover, those student activists, who were cognizant of their constitutional rights as citizens under the Dixon (1961) decision, also increasingly were demanding that they be granted a full range of civil liberties like all other citizens.

The crisis which brought all of these concerns into open conflict surfaced at the University of California's Berkeley campus in the fall of 1964. The immediate issue was the university's decision to suspend eight students who violated an old rule that prohibited political groups from solicitation of membership or collection of funds for off-campus political of social action on the Berkeley campus. Students were outraged because the liberal university administration had not enforced the solicitation rule for years, permitting such activity to occur at the edge of the campus. However, when outside agitators had began to disrupt normal campus activities and demonstrate on campus, action had been taken to prevent such activity.

As the 1964 Berkeley controversy widened and the conflict between the students and the university intensified, the issue enlarged to also encompass broader social and political issues beyond the direct control of the university. Ultimately, the students decided to test their political strength. Their weapon was a sit-in strike which stopped all

classes for two days. Police brought in by university officials countered with force. The end result was ugly confrontation and violence. The educational process was totally disrupted, and a large number of students were arrested as television cameras provided national press coverage.

To the Berkeley students' delight, violence and student arrests at Berkeley aroused strong generational support on the part of thousands of other heretofore moderate, less political students at Berkeley and across the nation. To the Berkeley administrators' dismay, the Berkeley confrontations had destroyed the relationship between American universities and American society. American colleges and universities were now front page news. The nature of confrontational politics had punctured the university myths and removed the protective cover under which universities operated. Paternalistic discipline, arbitrary decisions, and unfair practices on the part of universities no longer escaped public or journalistic scrutiny.

For the most part, the Berkeley student strike was successful, and the university officials were forced to capitulate to student demands for change. According to the President's Commission on Campus Unrest (1970),

> what happened at Berkeley was more than the sum of its parts. The events on that campus . . . defined an authentic political invention--a new and complex mixture of issues, tactics, emotions, and settings--that became the prototype for

> student protest throughout the decade. Nothing quite like it had ever before appeared in America. (p. 22)

For the first time in American history, student power was a political force which had the potential to exert national influence and change university policy.

Other student activists from across the nation delighted in the success of the Berkeley strike, identified with the concerns of the Berkeley revolt, and quickly moved to imitate the techniques of dissent and confrontation at Berkeley. For many relatively passive students, the Berkeley revolt gave them a shock of recognition. They were forced to acknowledge that they too believed that the actions of American social, political, and educational institutions were a contradiction of professed ideals with respect to democracy, equality, and opportunity.

With the 1965 escalation of the war in Vietnam, the student radicals drew more strident battle lines. In the expanded battle, U. S. President Lyndon Johnson was cast in the role of the evil war monger who perpetuated violence in the name of law and order (Hodgson, 1976/1978). The draft soon became the new unifying student issue, and anti-war demonstrations became a large part of the Berkeley scenario. Once again the Berkeley peace activists became the prototypes for student activists across the nation.

From 1964 through 1969, antiwar sentiment grew among students, and widespread public opposition to the war

intensified. Massive peace rallies, national opinion polls, and continuing student demonstrations drove Johnson from the White House. The majority of Americans demanded an end to the war. With the 1968 election of Richard Nixon who promised to end the war, campus activism by 1969 was declining. Through his decision to invade Cambodia in May 1970, President Nixon, however, rekindled a nationwide chain of student protests which shortly culminated in tragedy at Kent State University in Ohio and Jackson State University in Mississippi.

At Kent State during a rock-throwing confrontation and accelerated anti-war activism, Ohio National Guardsmen killed 4 students and injured 11 others. A few days later at Jackson State, 2 students were killed, and 12 were wounded by white police who fired into a dormitory at the black college. The killings at home were as appalling to students as the violence in Vietnam. According to Michener (1971), in the days following the Kent State and Jackson State tragedies, campus unrest intensified, and 760 colleges and universities out of the nation's approximately 2,500 either closed or had to severely curtail classes and normal activities.

As in 1963, the public again was stunned by the senseless violence splashed on the front pages of the newspapers. A handful of Americans even speculated that a student revolution could be imminent. This kind of speculation, however, quickly ceased as confrontations disappeared and

campuses quieted. Nixon's announcement on January 27, 1973, of a cease-fire agreement for the war in Vietnam helped to end finally the era of disturbing, sometimes bloody, campus unrest.

The end of the war brought the end of the student movement as a unified political coalition. During its short reign, however, the student coalition had helped students gain greater individual freedom, secure recognition of their rights as citizens, and challenge old assumptions about the student's role in and relationship to the university. According to Garson (1970), the unifying theme of the student movement always had been the democratization of all American institutions. Student activists had pushed for participatory democracy and the use of direct action. They had mobilized against passive acceptance or acquiescence to decisions made by the organized status quo, advocating instead personal involvement in decision making.

The desire for individual freedom and the notion that students could either choose to be part of the problem or become part of the solution had been the thrust behind widespread student demands for participation in decisions about academic policies and student life. When student demands had been met with intolerance, authoritarianism, or rejection, alienated students had believed they were left with the alternatives of violence and litigation. Usually, black and white radicals had chosen violence. Liberals,

moderates, and other civil rights activists had usually preferred to work within the system, often through the courts.

In spite of their differing political ideologies and tactics, the intent of all student activists of the 1960s was the same: They had wanted to make a difference, and they wanted to be both "franchised members of the university" (Ross, 1976, p. 134) and franchised members in the important social and political decisions of the day. By the early 1970s, few Americans would deny that the student movement had made a difference. Student activists had upset the "system" of the 1950s and had led many American institutions to re-examine themselves in light of the ideals of peace, social equality, racial equality, and individual freedom.

The Erosion of University Autonomy

During most of the three centuries before the 1960s, the American university had steadfastly resisted any efforts to tamper with its autonomy. The academic culture had generally given little more than lip service to suggestions from students unless economic pressure accompanied demands for change. Moreover, the university community had not welcomed the unsolicited "advice" of the courts either, though it had expected the courts' unfailing support of the status quo in education.

For a long time, tradition had dictated the acceptance of a carefully cultivated university mystique which dictated that postsecondary institutions were so complex and unique that outsiders could not fully understand or appreciate them. The bench and bar had supported this idea, according universities almost complete autonomy. Moreover, as long as the higher education enterprise was widely perceived as the primary institution for advancement of national and individual goals, neither the courts, society, nor the majority of students were willing to confront such a powerful, influential opponent.

Until the university mystique was shattered by the U. S. Supreme Court decisions concerning academic freedom and mandatory loyalty oaths for faculty in the 1950s and the due process cases of the 1960s, the few who had chosen to litigate against universities had stood little chance of winning. After the Fifth Circuit Court's decision in Dixon (1961), however, the university's autonomy began to erode quickly. The traditional relationship between students and public higher education institutions changed, and the judiciary's deferential behavior toward public higher education diminished. Equally significant, Dixon (1961) also created a climate conducive to voluntary changes in the relationship between the private university and its students.

In reality, continuing campus unrest over individual rights and demands for participation in university governance

during the 1960s had forced institutions to breach their traditional practice of refusing to seek outside help in resolving internal problems. Unlike the compliant students of the past, the new student activists refused to sit quietly as institutions responded to campus unrest with increased authoritarianism. Institutional authorities opened the gates to the ivory towers and invited outside police intervention because they saw no other viable alternatives. As a result, students in record numbers were arrested by civil authorities. This situation placed their student conflicts under the jurisdiction of the civil courts, resulting in reduced autonomy.

Persistently, student political activists accused their public and private institutions of arbitrariness and bad faith. They placed steady pressure on the judiciary to provide appropriate redress for violations to their constitutional and contractual rights. Sensitive to the social climate, conscious of state action principles, and responsive to the change in the age of majority in many states, the courts recognized the legal rights of students in higher education. Expanded student rights resulted in decreased autonomy for institutions.

Widespread public disenchantment with colleges and universities directly affected alumni support, and this concern, together with rising costs and the threat of declining enrollment, further compelled institutions to

enhance student rights. Mounting pressure by adult and part-time educational consumers who demanded quality in institutional services also prompted institutions to reconsider the student-university relationship. All of these pressures resulted in the erosion of overall university autonomy and the dramatic change in the legal status of students.

The Coevolution of Contractual and Constitutional Rights

For a few years, the Dixon (1961) and Carr (1962) decisions respectively served to carefully distinguish the different levels of protection afforded students of public and private postsecondary institutions. Students in private colleges and universities were increasingly frustrated that their counterparts in the public sector enjoyed new status because of their enforceable constitutional rights, while they continued to feel like second-class citizens. As student protests gained momentum and university autonomy eroded, students in private postsecondary institutions also began to clamor for constitutional rights.

Since the courts seemed ready to expand individual rights and recognize students as citizens with constitutional rights, private postsecondary students also attempted to apply the state action principle to their institutions. To trigger the application of the state action principle, they attempted to show that a nexus existed between private

postsecondary institutions and the state and federal government as a result of the public function performed by private colleges and universities by virtue of their tax exempt status and receipt of state and federal funds (Green v. Howard University, 1967; Grossner v. Trustees of Columbia University, 1968) or through state accreditation of their programs (Grafton v. Brooklyn Law School, 1973). Only in Powe v. Miles (1968) and Ryan v. Hofstra University (1971) and a few equally unusual cases were the courts willing to accept the application of the state action principle to private postsecondary institutions. Over time, the issue of state action in private colleges and universities showed little promise in the courts except in cases like Hammond v. University of Tampa (1965) where racially motivated discrimination was the issue. Ultimately, the contract, not the constitution, constituted the primary source of rights for students enrolled in private colleges and universities. In an era of student activism and expanding individual rights, this limitation frustrated and disappointed student litigants from private colleges and universities.

After the constitutional approach emerged, private college and university students were not the only individuals disappointed about limitations on their rights. Although constitutional rights for a time seemed to overshadow rights gained through contract, students from public postsecondary institutions soon learned that their rights as citizens under

the constitution extended only to suspensions and expulsions for disciplinary reasons or resulting from disregard for freedom of speech, freedom of the press, freedom of association, and freedom from unwarranted search and seizure. According to Mancuso (1976), constitutional protections defined in court battles from 1961 to 1976 were "almost universally limited to student discipline and held inapplicable to student complaints about academic dismissals or unfair grades" (p. 79).

In the leading case concerning academic dismissals, Connelly v. University of Vermont (1965), the court stated that in a public university

> student dismissals motivated by bad faith, arbitrariness, or capriciousness may be actionable. . . . This rule has been stated in a variety of ways by a number of courts. The effect of these decisions is to give the school authorities absolute discretion in determining whether a student has been delinquent in his studies and to place the burden on the student of showing that his dismissal was motivated by arbitrariness, capriciousness, or bad faith. (pp. 159-160)

In Gaspar v. Bruton (1975), the U. S. Court of Appeals of the Tenth Circuit reaffirmed Connelly (1965). Courts operating under the Connelly (1965) standard continued to uphold the institution as had been the courts' previous policy except in such early cases as People ex rel. Cecil v. Bellevue Hospital Medical College (1891). Clearly, the courts did not view academic dismissals in public institutions in the same light as disciplinary dismissals.

Contract principles, therefore, continued to offer more hope to public college and university students who felt their rights had been abused with respect to disputes over academic dismissals, grades, tuition refunds, or inferior instruction.

One clear example of the utility of the contract approach to public school students involved a transfer student at a community college in New York (Healy v. Larsson, 1971). Healy was denied his degree even though he had completed all course work detailed by several institutional agents who had advised him. The college justified the denial of degree because it maintained that he had failed to take all the necessary credits within the area concentration which led to the Associate of Arts degree. The court held that the student's fulfillment of the terms of the contractual agreement as indicated to him by recognized agents of the school entitled him to his degree.

As the 1960s ended and the 1970s began, politically astute public and private college students sought other legal avenues through which they could gain more individual rights. Instead of demanding constitutional rights, students began to present themselves to the courts as citizens who were due contractual rights as consumers of educational services. This expansion of the contract provided public and private college and university students additional protection, but was more helpful to students in private postsecondary

institutions where constitutional protection was inapplicable.

Other than the Bill of Rights and the 14th Amendment which uniquely applied to state conduct, the standard of reasonable rules reasonably applied remained the most reliable court "yardstick" for determining the rights of students in both public and private institutions. Of course, what was reasonable still was to be defined by each court according to its discretionary concept of reasonable. Most courts continued to weigh the mutual obligations of the contract such that the scales generally tipped in favor of the institution. Furthermore, unlike standard commercial contracts, vague language in education contracts did not cause the court to interpret the contract against the contract's formulator. Moreover, in accordance with well established legal principles at the end of the 1960s, those due process procedures granted to students of private postsecondary institutions continued to be voluntary, whereas, in disciplinary dismissals, procedural and substantive due process granted to students of all public postsecondary institutions were obligatory.

The End of the Liberal Consensus

University autonomy was not the only thing which was eroded during the 1960s. Ideologically, the liberal consensus had believed that under its leadership, poverty,

discrimination, Communism, and institutional abuse of power would become extinct. This idealistic vision of a perfectible society had been fueled by past New Deal victories over the Great Depression and Hitler's Nazi Empire. What the remnants of the New Deal liberal consensus came to realize over the 12 years from 1960 to 1972 was that social transformations and geopolitical change did not occur in a vacuum (Hodgson,1976). The age of social protest and campus unrest had permanently changed America and Americans.

By 1968, the conservative economic elite, fundamentalist Protestants, and American working class felt that, in their zeal to be a part of the solution, liberal activists, rebellious students, and militant minorities had become major contributors to society's problems. Middle America's response to the exhausted liberal consensus, symbolized by Kennedy and Johnson, was the election of Richard Nixon as U. S. President in 1968 and again in 1972. To the emerging new moderate consensus, Nixon represented a return to what Reichley (1969) termed "the traditional values of middle class America--hard work, individual enterprise, orderly behavior, love of country, moral piety, material progress" (p. 72). In reality, Nixon had campaigned against radicals and dissenters, the U. S. Supreme Court liberals, obscenity, and widespread use of drugs to underscore his image as a conservative. However, in practice, he had carried out moderate Republican policies and had continued the liberal

practice of encouraging the growth of the federal government, a practice which would later be denounced by the New Right in 1980.

The 1970s: A Revised Vision

The third period of tremendous change in America after World War II began with public disclosure of the "Watergate scandal." As more national figures were drawn into the Watergate scandal, the public's confidence in government rapidly eroded. Perhaps Watergate alone would not have brought about the change in public mood in the mid-1970s. However, by the election of 1976, Watergate combined with the economic downturn, declining American influence internationally, and mounting disregard for consumer rights had greatly diminished the public's willingness to believe in the American dream. American values and beliefs were reexamined by veterans, racial minorities, women, students, and a large part of the middle class. To many, Martin Luther King's "Dream," John Kennedy's "Camelot," and Lyndon Johnson's "Great Society" seemed more myth than reality. The vision of the 1960s was not the vision of the 1970s.

The Aftermath of Watergate

Although Nixon had never achieved the mythical status or charisma of Roosevelt or Kennedy, many Americans had trusted him and wrapped him in a kind of protective suspended

disbelief. They had chosen to ignore evidence of his previous use of suspect politics, his paranoid distrust and dislike of the media, and his casual regard for the constitutional rights of suspected Communists in the 1950s. Revelations about the Vietnam War in the "Pentagon Papers" and disclosures about the Watergate affair shattered the public's faith in Nixon, their governing institutions, and their elected officials. Millions of Americans were outraged at government lies, unethical behavior, and abuse of executive power and executive privilege during the Nixon years. They were also alarmed at widespread flagrant violations of the constitutional rights of citizens under the guise of national security.

While alienation and impotence was the price that liberals had paid for their past illusions in the early 1960s, after Watergate, the more moderate consensus also paid for its misplaced confidence. The nation as a whole experienced another identity crisis. Scores of Americans abandoned political involvement and social issues and became immersed in themselves. This preoccupation prompted Tom Wolfe to characterize the period and it values as the "me generation."

Though better educated and better informed, Americans of the 1970s became more cynical, more uncertain about their futures, and more focused on self-examination and self-gratification. Although Johnson (1980) did not completely

agree that American society in the late 1970s was totally immersed in what Lasch (1979) described as the culture of narcissism, he did cite convincing evidence that the nation was preoccupied with a search for selfhood. To Johnson (1980), the "explosion of the physical self-improvement culture," the overwhelming successes of Looking out for Number One and The Complete Book of Running, and the great popularity of "self-improvement-at-any-price" books in the mass culture markets represented tangible proof of a shift in American attitudes and values (p. 128). Clearly, the Vietnam and Watergate crises had caused the majority of Americans to feel thwarted in their efforts to make a difference on the domestic and geopolitical fronts. Subsequently, they turned to personal issues where realistically they could exert more direct influence.

When Gerald Ford took over the reigns of the government after Nixon's resignation in 1973, he tried to put behind him the protracted political crisis which had begun with Vietnam, urban riots, and campus unrest and ended with Watergate and the oil embargo. Ford's job was difficult, even for a seasoned politician. He was confronted by many citizens who no longer wanted to vote and a nation that no longer had trust in its leaders' abilities to solve complex contemporary problems.

Unlike their postwar counterparts, many Americans after Watergate no longer believed in the American dream or felt

confident their expectations for personal success could be realized. Students of the post-Watergate era also began to feel directly the effects of the economic downturn. Some turned to drugs or sex for solace; others chose to fight aggressively the system in order to protect their own interests. Increasingly, the courts became battlegrounds as students changed educational policy questions into legal questions (Kaplin, 1985).

The crisis of public confidence continued as the 1976 presidential election between Carter and Ford approached. As the era of seemingly endless economic growth slowed, environmental problems became acute, and the public's confidence in government was at its lowest since the early Depression, voter apathy also had became widespread. According to Germond and Witcover (1981), barely half of the number of voting-age Americans even cast their ballots in the 1976 presidential election. Johnson (1980) described the effects of the post-Watergate crisis on the voter:

> While voters were looking for leadership, they no longer expected some presidential father-figure to solve their problems. They knew there were no miracle rulers. Indeed, they didn't expect nearly so much from their politicians--or from anyone else. To many, the national government, as they perceived it functioning, was becoming incapable of significantly addressing their individual problems. They began to look to themselves. (p. 116)

The Carter Years

The election of Jimmy Carter as U. S. President in 1976 did little to allay society's crisis of confidence or restore faith in the American government. Both the power elite and middle class already had lost faith in the ability of the national political processes to address the pressing issues of the late 1970s. Carter's image as a new face from outside the Washington establishment had offered renewed hope to some who felt the need for new leadership and new ideas. Soon these hopes were dashed.

Carter soon was perceived by many Americans as unsuited for the job of returning America to its position as sovereign of world affairs. He was not able to effectively streamline the bureaucracy or bolster the flagging economy as promised. His handling of the Iranian hostage crisis generally served to remind the public of his overall inability to restore America to the "Golden Age" of postwar dominance. Even his successful handling of the peace negotiation between Egypt and Israel and his strong stand on human rights did not change the public's perception that he was inconsistent, weak, and generally ineffective with no clear identity and no concrete agenda for the future.

Carter's defeat in 1980 by Ronald Reagan came as no surprise to political analysts. However, the overwhelming Reagan landslide and the election of many Republicans in gubernatorial and congressional elections was a shock (Link

et al., 1981). For the first time since 1952, the U. S. Senate had a Republican majority. The moderate programs of Carter, whose administration represented the remnants of New-Deal liberalism, were resoundingly rejected for the new conservative agenda articulated by Reagan. This New Right was far more conservative than the moderately conservative administrations of Republicans Eisenhower, Nixon, and Ford. In fact, the new conservative movement was so radically different from any of the postwar Democratic or Republican administrations that the popular press referred to it as the "Reagan Revolution" and political analyst Blumenthal (1986), called it the "Counter-Establishment."

The "Me Generation" of Student Consumers

Although students in the 1970s had been granted the right to vote through passage of the 26th Amendment in 1972, they were not confident that the attendant change in their legal status would translate into protection of their rights as students. Like many voting-age Americans in the 1970s, they too had become disillusioned with the political practices and policies of the 1960s and 1970s. They had also witnessed a major realignment take place in the U. S. Supreme Court with the retirement of Chief Justice Earl Warren and liberal Associate Justice William O. Douglas, two great defenders of individual rights. They were concerned that the Nixon appointees to the court under the leadership of the more

conservative Warren Burger would result in a retreat from some of the Warren Court's historic decisions concerning racial equality and expanded civil rights which had helped to set the tone for lower courts in student-university conflicts concerning the legal status of students. They sensed that the style, direction, and momentum of the Burger Court had already shifted the focus away from the individual and toward the system (Funston, 1977).

In light of the changes in the composition of the U. S. Supreme Court and the inadequacies of the political process, students remained vigilant of their constitutional rights as citizens and their contractual rights as parties to contracts. To protect these rights, some joined special interest groups which advocated the rights of blacks, homosexuals, ethnic minorities, women, and consumers. Increasingly, consumer issues became more significant to a wider audience because the age of majority had changed in many states, according students the legal right to contract and to sue if their rights as purchasers of services were violated. By demanding rights by virtue of their status as consumers with basic rights guaranteed by state and federal statutes, students were able to gain new rights without the use of individual confrontation or mass demonstration.

Although educational services had been viewed in a different way from other services historically, gradual changes in perceptions led to an expanded definition of

consumerism. The precise manner in which the modern postsecondary student could be viewed as a consumer with attendant rights under contract was presented by Willett (1974):

> Institutions and educational programs provide, or purport to provide a learning experience for their students. The student generally expects that in return for his financial and time commitments his acquired education will lead somewhere--to a job, to increased skills and new appreciations, to an enriched life. In other words, the student "contracts" with an institution or educational program to purchase educational services that the institution or program has announced or advertised, and which the student expects to benefit him. Under this arrangement, the student is the primary consumer of educational services in the educational marketplace. (p. 78)

Two methods of addressing consumer problems relating to educational services involved working through the system. Students called on private professional education organizations, accreditation agencies, state and federal agencies, and consumer offices to intervene on their behalf and help protect them as educational consumers. Often this approach was quite effective. Another method involved direct appeal to institutional authorities through student representatives on a variety of committees and boards at the institutional level. Institutions frequently responded to this approach. When these approaches failed, students filed breach of contract suits or tort claims of negligence and misrepresentation to force higher education institutions to

treat them more equitably and to adhere to advertised promises and expressed and implied contractual obligations.

Even though there were a few contract cases based on consumer rights in the late 1960s, student litigants did not make widespread use of this tactic until the early 1970s.

Increased Student Litigation in the 1970s

Beginning in the 1970s, higher education was "showered" with cases which often involved complaints based at least in part on student rights as purchasers of educational services. Tort and contract claims were based on a variety of abuses. According to De Rowe (1983), some of these included unfair and misleading recruitment and admission practices, unfair fee or tuition increases, unfair refund policies, discontinuation of announced programs or classes, and cancellation of scholarships. Further student demands for institutional accountability came from deviations from printed promises, statements, procedures, and regulations (De Rowe, 1983). Such academic issues as denial of degrees on unwarranted grounds, unfair grading practices, unfair changes in program requirements, and dismissals for poor academic performance also greatly concerned students (De Rowe, 1983). Students who were demanding equitable treatment or adherence to procedural due process in disciplinary dismissals also became advocates of the consumer approach (De Rowe, 1983). Although not all court cases involving these issues relied on

contract or raised consumer issues, in many instances this tactic was employed either directly or indirectly.

Admissions Policies

Since admissions was the first hurdle for students entering college, the issue of unfair and undependable admissions practices and policies was of critical importance. Traditionally, postsecondary institutions had enjoyed considerable autonomy with respect to admissions; however, institutional autonomy came under great pressure in the 1970s when students challenged the selection process and the admissions standards of public and private institutions. The two leading cases where students won victories in admissions cases based on contract were Eden v. Board of Trustees of the State of New York (1975) and Steinberg v. Chicago Medical School (1977).

Eden v. Board of Trustees of the State of New York (1975) involved students who had been admitted to a new podiatry program but were not permitted to enroll. After their admission to the program, the entire program had been cancelled prior to opening due to state fiscal problems. The students claimed that, upon admission, they had entered a contract with the university and that suspension of the podiatry school was a breach of contract. Although the court acknowledged that the state could legally abrogate a contract in order to protect the public interest in cases of financial

exigency, the court decided to interfere on behalf of the students because the faculty was already under contract and would have to be paid anyway. In effect, money would be lost and tuition would not be collected if the state delayed the opening. Since the financial crisis was not alleviated by cancellation of the program and money would not be saved by cancellation, the court considered the cancellation an arbitrary and capricious act which constituted breach of contract.

The Eden (1975) case firmly established that once the student was accepted for admission, the public postsecondary institution was contractually bound to provide the educational service advertised at the time of the student's application. Had the court not determined that the institution's action was arbitrary and capricious, a defense of termination of contract to protect the public interest could have been effective. Such a defense, however, was inapplicable to private postsecondary institutions.

In the other leading case, Steinberg v. Chicago Medical College (1977), the student's complaint was that the private school published one set of criteria for judging candidates for admissions but in reality used another set which judged admissions on family relationships and ability to contribute financially to the institution. Steinberg contended that he had entered into a contract with the school and was entitled to be judged for admission on the basis of the bulletin's

stated criteria. The intermediate appellate court upheld the student and held that when the school accepted the student's application fee, the two parties entered into a binding contract which obligated the institution to adhere to its published admissions criteria. The court limited the decision by noting that the contract did not require the school to admit all students, only to evaluate them fairly based on printed criteria for evaluating applicants. The Supreme Court of Illinois affirmed the lower court's decision.

When the school did publish restrictions or reserve the right to use supplementary admissions criteria not specifically stipulated, the court tended to rule in favor of the institution. For example, in Donnelly v. Suffolk University (1975), the student complained that by including recommendations from the institution's students, friends, and alumni as part of the overall criteria used in judging admissions to the law school, Suffolk University was unfair to him in light of the school's published policy regarding admissions. The court examined the policy for admissions and upheld the institution because there was nothing deceptive or unfair about the policy. The institution's written statements on admissions did not restrict itself to test scores and related evidence of past performance alone but rather called for use of "all relevant evidence brought to the committee's attention" (p. 921).

The courts also ruled in favor of the student in cases where it could determine abuse of institutional discretion. This was the case in State ex rel. Bartlett v. Pantzer (1971). The University of Montana Law School informed a student that he would be accepted for admission if he took a class in financial accounting. The student took the course and earned a grade of "D". The law school refused him admission because they deemed the grade "acceptable" but not "satisfactory" as required. The student filed suit charging the institution was unreasonable to set a standard of satisfactory performance after the course had already been completed and not before. The court entered judgment favoring the student:

> We look to the matter of judgment in "discretion" in a legal sense. To cause a young man, who is otherwise qualified and whose entry into Law School would not interfere with the educational process in any discernible fashion, to lose a year and an opportunity for education on the technical, unpublished distinction between the words "satisfactory" and "acceptable" as applied to a credit-earning grade from a recognized institution is, in our view, an abuse of discretion. (p. 397)

In Grove v. Ohio State University, College of Veterinary Medicine (1976) and Mewshaw v. Brooklyn Law School (1976), both courts ruled in favor of the institution. No evidence in either case showed that the institution abused its discretion when applying admissions policies.

Tuition

Disputes involving tuition had always been important to students, and this was one of the major issues that resurfaced in the courts in the 1970s. According to De Rowe (1983), tuition complaints based on consumer rights involved one of three issues: tuition refunds, increases, and defaults. Typical of the courts' varied responses in tuition refund cases were Drucker v. New York University (1969), Paynter v. New York University (1971), and Dubrow v. Briansky Saratoga Ballet Center, Inc. (1971). Representative of the cases regarding unjust or unfair tuition increases were Basch v. George Washington University (1977), Silver v. Queens College of the City University (1970), and Auser v. Cornell University (1972). Cazenovia College v. Patterson (1974) was representative of the tuition default cases.

In Drucker v. New York University (1969), a student who withdrew from New York University's Dental School shortly before the first term began requested a refund of the initial deposit he had paid to insure his space in the class and a refund for the first semester's tuition he had paid in advance. The institution claimed that it had a legal right to retain any fees paid because the letter requesting the deposit clearly stated that the deposit would only be refunded in the case of withdrawal due to illness. Catalogue provisions also stated that no tuition would be returned after the student had registered and paid tuition. Although

the trial court ruled that the student should forfeit the deposit because the letter had specifically stated that the fee was non-refundable, it ruled in favor of the student regarding the return of the tuition. The court reasoned that the student's attention had not been drawn to the catalogue's policy concerning tuition refunds. On appeal, however, the New York Supreme Court, Appellate Term, ruled for the institution, following the precedent established in William v. Stein (1917) and Van Brink v. Lehman (1922) that tuition for an entire year was entire and indivisible.

In another tuition refund case, Paynter v. New York University (1971), a student claimed he was due a refund because those classes remaining before examinations had been cancelled by the institution as a result of excessive campus unrest following the Kent State University tragedies. The trial court refused to accept the institution's defense that university bulletin statements permitted the institution to change academic programs without notice. On appeal, however, the New York Supreme Court, Appellate Term, upheld the institution and explained the trial court's error:

> In the light of the events on the defendant's campus and in college communities throughout the country on May 4 and 5, 1970, the court erred in substituting its judgment for that of the university administrators and in concluding that the university was unjustified in suspending classes for the time remaining in the school year prior to the examination period. The circumstances of the relationship permit the implication that the professor or the college may make

> minor changes in this regard. The insubstantial change made in the schedule of classes does not permit a recovery of tuition. (p. 893)

With regard to awarding the student proportional recovery for the days he could not attend class, the court further commented on the criteria for determining whether the institutions's contractual obligation to the student had been fulfilled:

> While in a strict sense, a student contracts with a college or a university for a number of courses to be given during the academic year, the services rendered by the university cannot be measured by the time spent in the classroom. (p. 894)

In contrast to Paynter (1971), the Civil Court of the City of New York in Dubrow v. Briansky Saratoga Ballet Center Inc. (1971) ordered a proportional refund to the student. In Dubrow (1971), the student had paid tuition and had remained in the summer term only 3 days before withdrawing because of serious illness. Contract provisions permitted refunds until one week before the term's commencement, permitted no refunds for absences, but made no specific mention of a provision for withdrawal for illness. The court distinguished this case from William v. Stein (1917) and Drucker (1969) which relied on contracts which were entire and indivisible but which permitted refunds when students suffered serious or prolonged illness. The court found that although the contract did not have an expressed provision allowing a tuition refund in case

of illness, there existed an implied condition in the contract

> that the contract included the condition subsequent that the parties shall be capable of performing and that sickness or death of the student operates to terminate the contract and release the parties from their contractual obligations. (p. 504)

Therefore, the court allowed the institution to retain tuition for the time the student attended but ordered a proportional refund for the prepaid time for which the student could not attend.

A look at these and other similar tuition refund cases revealed variations in courts' determinations of these cases. These three cases from the same state illustrate that trial courts and appellate courts often use very different reasoning in deciding such cases. De Rowe (1983) also noted this tendency:

> As the varied outcomes of seemingly similar cases indicate, there is not a consistent line of reasoning used by the courts in tuition refund cases. The outcomes appear to depend on the merits of each case and the individual court interpretation of these circumstances. (p. 111)

Student breach of contract suits involving unfair or excessive tuition increases became another topic of concern during the economic downturn of the mid-1970s. In deciding cases involving unfair tuition increases, the courts relied on statements found in college bulletins and other printed materials which expressed contract terms and conditions. The

fairness or reasonableness of the tuition increases generally was not reviewed by the courts. Basch v. George Washington University (1977) was typical of this approach. In Basch (1977), a group of medical students filed a class action suit which claimed that their contracts were breached when the university raised tuition $1600 above the $200 annual increase estimated in the university's bulletin. However, the university bulletin did include a reservation clause which permitted the university to adjust the estimate if future economic data made additional increases necessary. The students claimed that the university could make no tuition increases above $200 unless the institution could prove economic data warranted the change. They claimed they had been given no such data and no explanation for the dramatic increase.

The court upheld the institution's right to increase tuition, maintaining that language contained in the catalogue did not bind the university.

> At best these words expressed an expectancy by the University regarding future increases. This is not a promise susceptible of enforcement. (p. 1368)

The same argument was advanced by medical students at Northwestern University (Eisele v. Ayers, 1978). As in Basch (1977), the students were also unable to defeat a large tuition increase. The court determined that since possible increases had been mentioned in the catalogue and decreased

federal aid had made the tuition modification necessary, the university had not taken unfair advantage of the students.

However, in Silver v. Queens College of the City University (1970), the student prevailed. The student protested payment of additional charges after paying tuition according to information published in the college curriculum. In this instance, no reservation clause was included in the college's published statements. The court held that a contract existed and that the tuition rate as published was binding in spite of the city's reduction in budgeted funds for Queens College.

In Auser v. Cornell University (1972), the situation was slightly different. The student questioned the legality of the university's policy which charged a transfer fee for transferring from one college to another within the university. Relying on Carr (1962), the court upheld the idea that the school had wide discretion in determining school policy concerning students. Since the student had been advised of the transfer tuition fee in the catalogue previous to his transfer, he was considered to have accepted the fee as part of the contract's terms. Therefore, the terms of the contract, including the transfer fee, were valid and enforceable because no fraud or mistake were shown. The wisdom of the fee was not reviewed by the court.

Tuition lawsuits involving tuition defaults have provided more positive results for students. In Albert Merrill School

v. Eugene Godoy (1974), the institution sued for recovery of the balance of the tuition of a Spanish-speaking student who had completed 70% of a data processing course at withdrawal. The student had attempted to withdraw twice before but was discouraged even though his English skills were not good enough for him to successfully complete the course. The court applied the doctrine of unconscionability and ruled that the bargaining powers of the two parties were so uneven that recovery of the tuition would produce results which were unreasonably favorable to the institution, given the student's language difficulties and aptitude. On his countersuit, the Civil Court of New York City, citing the New York City Consumer Protection Law and Uniform Commercial Code, awarded the student the difference between the actual tuition paid up to withdrawal and the amount due when he had previously attempted to withdraw but was falsely encouraged to continue by the institution.

In Cazenovia College v. Patterson (1974), the student's father prevailed. In this case, however, the student's father paid a tuition deposit for the upcoming fall term beginning in September, but notified the school of her withdrawal in August. The contract stated that if notification of withdrawal was before May 1, the student could receive a fall refund; after September 1, the student would be held liable for the entire year's fees and tuition and would receive no refund regardless of the reason. The

contract made no mention of withdrawal in the interim period. The school entered suit for the entire year's tuition. The student's father, the defendant, claimed that since his daughter had notified the institution of her intent to withdraw before the September deadline, he was not liable for the year's tuition and fees. The court remitted the case for further trial to determine the fact question as to what the contract meant with respect to withdrawal in the interim period between May 1 and September 2. The trial court, however, determined that the student would have to forfeit her deposit, but she could not be held liable for the year's tuition and fees. The court suggested that the mention of a specific date in September would be meaningless unless it was intended as a deadline.

Scholarship Termination or Cancellation

When students had their scholarships terminated, they often turned to the courts for redress when efforts to resolve the issue with the institution failed. Breach of contract was the approach used by several students whose scholarships were either rescinded or cancelled. None of these students were successful, however.

In Taylor v. Wake Forest University (1972), a football player alleged that as part of his contract he had an oral agreement with the university which permitted him to limit or eliminate football practice if his academic progress was in

jeopardy. Based on the terms of his contract, he had refused to practice or play football because it "interfered with [his] reasonable academic progress" (p. 382). His scholarship was cancelled, and upon graduation, he entered suit to recover the scholarship funds.

The court determined reasonable academic progress to mean maintaining grades at a standard which the university considered acceptable for continued good standing. Because Taylor's grades measurably exceeded the university's requirements, his failure to participate in work-outs, practice, or play were deemed a breach of his contract with the institution. The court reasoned that his scholarship required him to maintain both athletic and academic eligibility. Although this state court recognized that an actionable contract right existed between a student athlete and the university, in this specific case, the student's claim of breach was without merit.

In Begley v. Corporation of Mercer University (1973), the federal court also ruled in favor of the university. Here, the university had miscalculated the student's grade point average and had awarded him an athletic scholarship based on incorrect data. Upon discovery of the mistake, the student's scholarship had been rescinded because he was ineligible to play according to National Collegiate Athletic Association (NCAA) regulations. The student entered suit for breach of contract. The court determined that since the student was

unable to carry out his obligation under the contract, the institution was not required to fulfill its obligation either.

Another student sued for breach of contract when his fellowship awarded for the following year was revoked because the state statute authorizing the academic award was repealed before the beginning of the academic year. Unlike the previous two scholarship cases, in Ewing v. State (1972), the New York Court of Claims held that the award of scholarships was "not contractual in nature" (p. 924).

Lawsuits for Discontinuance of Academic Services

Once enrolled, students often took legal action against postsecondary institutions when classes were cancelled, when courses were eliminated for certain students, or when entire programs were terminated or failed. When services were discontinued, students often claimed that the institution had a contractual obligation to provide them an opportunity to complete classes or programs offered, and if the institution could not provide such educational services, it was liable for damages for breach of contract. The leading cases concerning cancellation of classes were Zumbrun v. University of Southern California (1972) and Paynter v. New York University (1970). In Speier v. Webster College (1981), the contract claim was for course cancellation. The leading cases concerning termination of programs because of financial

exigency were Eden v. State University of New York (1975), Behrend v. State (1977), Perretti v. Montana (1979), and its companion case State of Montana v. Peretti (1981). Program termination due to the permanent closing of a proprietary school was the issue in Wilcox v. Public Service Mutual Insurance Company (1979). In Lowenthal v. Vanderbilt University (1977), the issue was termination because of internal strife within the department.

In Zumbrun v. University of Southern College (1972), when student consumer claims for breach of contract were in the early stages, the court recognized that

> the basic legal relation between a student and a private university or college is contractual in nature. The catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant becomes a part of the contract. (p. 504)

The student in Zumbrun (1972) was a senior citizen. She claimed that as a party to an educational contract, she was entitled to the lectures and final examination for a course in which she was enrolled when the instructor cancelled the class one month before the quarter ended. The class had been cancelled as a part of a faculty protest to register dissatisfaction with American foreign policy in Cambodia. The student was not permitted to take the final examination as requested and was given a grade based on work completed before the class cancellation. Subsequently, she entered suit for breach of her contract.

In contrast to the student in Paynter (1971), Zumbrun prevailed. Citing Paynter (1971), the appellate court remanded the case to the appropriate forum for further proceedings to determine whether the breach of contract was a minimal or significant departure from the scheduled course. As in Paynter (1970), a minimal departure would not entitle the student to a refund of tuition. In both Paynter (1970) and Zumbrun (1972), the courts recognized that class cancellation for a short time was permissible. However, if classes were cancelled for more than a minimal time, this situation would constitute breach of contract and would warrant recovery of damages.

In two related cases De Vito v. McMurray (1970) and Harte v. Adelphi University (1970), class cancellations were also due to campus disruption and unrest. In De Vito (1970), the courts ordered Queens College to adhere to a city university directive to remain open and complete instruction in all classes. Some instructors had substituted seminars on current events for the regularly scheduled classes. In Harte (1970), the court, however, permitted the university to close for less than one week without imposing damages because the institution had acted in good faith to preserve life and property.

In Speier v. Webster College (1981), the students brought action against the college for course cancellation. In this instance, the institution cancelled a graduate program

offered through extension at a military base in which eight policemen were participating. The institution decided to limit enrollment to military personnel only and cancelled the extension courses for all other students. The court awarded the policemen damages in the form of tuition refunds.

When institutions terminated existing programs or cancelled promised programs due to financial crisis, students who were adversely affected often went to court. The same was true of students whose institutions allowed programs to deteriorate to a point where the institution lost accreditation or allowed the quality of programs to erode because of poor program management on the part of faculty and administration. Although the courts acknowledged the institution's right to terminate programs in times of true financial crisis, it clearly upheld the rights of students to complete programs to which they already had been admitted or enrolled. In cases where programs could not be continued, the institutions were held liable for damages to students. The courts also held institutions responsible for maintaining the accreditation or basic integrity of programs as initially advertised and promised at enrollment.

Termination because of financial crisis was the issue in several cases. Although the court denied the students' request for a temporary injunction to prevent a pharmacy school affiliated with Columbia College from closing before they could graduate (Galton v. College of Pharmaceutical

Sciences, Columbia University, 1972), the court did acknowledge that the students had rights. Because the financial crisis that prompted the program termination was deemed an unavoidable circumstance and not an arbitrary action, the court concluded that

> upon admission of a student to a college there is some obligation under the part of the college to permit the student to continue his studies to graduation if willing and eligible to continue. Of course, if circumstances beyond the control of the college, such as a lack of finances, prevent the college from continuing, the issue is concluded. But there must be an opportunity to inquire into the basis of the determination. The court must provide it. (p. 912)

The decision reached by the court in the previously discussed case, Eden v. Board of Trustees of the State of New York (1975), followed the same reasoning as Galton (1972). In Eden (1975), the school's deferment decision regarding the planned opening of a podiatry school was deemed to be arbitrary and capricious. This conclusion led to a decision favoring the students and preventing immediate closure of the school.

Program termination was again addressed in Peretti v. the State of Montana (1979). Students in an aviation technology program of Montana State Vocational Center were only partially finished with the program when the institution cancelled it, citing financial crisis. The program was advertised as leading to a pilot's license and subsequent employment opportunities. Students who were unable to

complete the entire program were unqualified to obtain either licenses or employment. The U. S. District Court for the District of Montana found breach of the academic contract and awarded the students damages for injury to their rights "arising out of an implied contract [which came] within the Fourteenth Amendment protection of life and property" (p. 756).

Subsequently, the state of Montana appealed the district court's decision (Montana v. Peretti, 1981). The U. S. Ninth Circuit Court of Appeals reversed the damages. Furthermore, it described as a "dubious assumption" (p. 758) the district court's notion that interests arising from an academic contract came under constitutional protection.

Program failure which came about because the institution had not protected the quality and integrity of its program was the issue in other important cases, Behrend v. State (1977) and Lowenthal v. Vanderbilt (1979). In Behrend (1979), the Ohio University School for Architecture faculty had encouraged students to enter the architecture program and had promised them that the school would be upgraded and soon have its accreditation restored. Graduation from a non-accredited architecture school would have rendered students ineligible to take state professional examinations without further work and delay. While the students were enrolled, the quality of the architecture program deteriorated such that the board of trustees, considering sparse resources,

decided to terminate the program entirely. As a consequence, the program also did not regain accreditation.

The impact on students enrolled during this period was substantial; they had few alternatives. Acting on repeated promises that the institution would regain accreditation, they had enrolled. When accreditation was not restored, they could neither transfer the credits already earned in a non-accredited program nor were they eligible to take the professional examination upon graduation. They sued for breach of contract, and the court upheld their position.

In coming to its decision, the court balanced the interests of both parties to the implied contract in the following manner:

> Our holding that...these student plaintiffs...be provided accredited academic training is not saying that the board of trustees was powerless to discontinue certain educational schools and departments pursuant to the determination of the board. The board of trustees has the jurisdiction to make the policy determination of the continued existence of the various departments within the university.
>
> However, where a determination is made affecting those with whom the university had contracted, unless there is shown to be an impossibility of performance, the contract must be fulfilled; or damages awarded.
>
> Here, instead of showing an impossibility of performance, Ohio University proved that the college of Fine Arts, and then the board of trustees of the university, made a selection of academic goals and that the other departments in the college of Fine Arts were chosen to continue

> rather than the School of Architecture. (p. 621)

In a similar case where failure to secure accreditation was the issue, the court also found that the student could sue for damages. In Pacquin v. Northern Michigan University (1977), a nursing program at a state university failed to gain accreditation as promised, and as a consequence the student could not get the appropriate credentials necessary for the practice of nursing. The court viewed the institution's failure to uphold its promises as a breach of contract, but it avoided a decision on the case's merits because contract claims against state agencies fell under the exclusive jurisdiction of the court of claims.

In a slightly different case, Lowenthal v. Vanderbilt University (1977), the issue was program failure which came about because of internal disorganization within the department. In Lowenthal (1977), the plaintiffs were eight former doctoral students who had entered a non-traditional, unstructured doctoral program in the Graduate School of Management at Vanderbilt University. When entering, the students had relied on the graduate school's continuation of a consistent, respectable, high quality program. The program failed to maintain its integrity as far as quality and consistency were concerned, and the students sued for breach of contract.

The students claimed in their suit that lack of cohesion in the faculty and poor departmental decision-making

regarding formal program guidelines had led to so many changes in the 1974-75 program expectations, regulations, and procedures that their work which had already been submitted and approved for entering the dissertation phase was re-evaluated and subsequently disapproved. The overall reassessment of student competence had resulted in some expulsions and had forced all doctoral students to take examinations regardless of whether they had previously met the requirements for waiving the examination. Although the institution relented under stringent protest and rescinded the changes for these students, the students entered suit against the university and refused to return to the inconsistent program.

After extensive review of the program, the Chancery Court of Nashville ruled that since its inception in 1973, the overall program had deteriorated to such a degree that in 1975 it was no longer reasonably and consistently meeting its contractual obligations to its students. While the changes in 1974-75 were insufficient to constitute a breach, the overall collapse of the program was. The court awarded the students all their previous tuition, duplicating and typing costs, and interest on educational loans, but not foundation grant money, costs of books, or loss of potential earnings.

Deviations from Institutional Promises, Statements, Procedures, and Regulations

In the 1970s, courts also recognized the student's contractual right to redress when institutions deviated from written policies, statements, procedures, or published regulations. A student pressed the courts to adhere strictly to printed grade change policies in Lyons v. Salve Regina College (1977). Students in Blank v. Board of Higher Education (1966) and Healy v. Larsson (1971) asked the courts to hold postsecondary institutions accountable for the misstatements or inaccurate advice of their authorized institutional agents. In Abrams v. Illinois College of Podiatric Medicine (1979), a student based a portion of his claim on the institution's failure to comply with oral assurances and the other parts on failure to adhere to the printed statements in the handbook.

In cases regarding these issues, most courts attempted to safeguard students against extremely arbitrary and discriminatory behavior by institutional authorities. Courts also attempted to balance more fairly the rights of students with those traditionally granted to universities and colleges. As with other student consumer issues, students' attempts to gain redress in cases dealing with deviations from promises, statements, procedures, and regulations were only partially successful. One explanation for this is that students tended to interpret arbitrary action in very

specific terms, while the courts tended to interpret arbitrary action more broadly, permitting institutions much greater discretionary latitude than students felt was fair or equitable.

Lyons v. Salve Regina College (1977) is illustrative of the mixed reactions of courts in the 1970s to student suits for breach of contract. The U. S. District Court for the District of Rhode Island in 1976 had recognized written procedures in the catalogue and other documents as evidence of a valid contract between the two parties. In contrast, the U. S. First Circuit Court of Appeals refused to apply rigidly commercial contract law to the student-university relationship.

The specific issue on appeal was whether the college had adhered to the grade change policy printed in the catalogue and established in other documents. The student maintained that the catalogue stated that the grades appeals committee would hear all cases and make recommendations to the dean, regarding grade changes. The lower court had ruled that the dean was contractually bound by the college booklet's procedures until it changed them. Thus, he was obliged to follow the committee's recommendation which called for changing the student's grade from "F" to "I". The institution had appealed.

On appeal, the U. S. First Circuit Court of Appeals in Lyons (1977) disagreed with the ruling of the district court.

Interpreting the meaning of "recommendation" as advisory rather than obligatory, the appellate court upheld the dean's authority to depart form the committee's recommendation. Rejecting a rigid application of commercial contract law, the United States First Circuit Court of Appeals gave this justification for the reversal:

> There is nothing in the instant record to indicate that a student at Salve Regina College had any rational basis for believing that the word "recommendation" meant anything other than its normal everyday meaning. It is not a word of art, nor has it acquired any secondary meaning in academic circles which can be discerned from the instant record. (p. 204)

Other instances where courts also held colleges and universities responsible for their oral promises in breach of contract suits were two frequently cited cases involving misstatements in advisement (Blank v. Board of Higher Education, 1966; Healy v. Larsson, 1971). In Blank (1966), the student had relied on the erroneous oral advice of a program advisor, members of the faculty, and a department chairman when he had enrolled in a special option program to complete two classes required for his degree at Brooklyn College. He had chosen to take correspondence classes under a professional option plan where he was not required to attend the classes because he was simultaneously enrolled in law school. Blank passed examinations in both classes, and the grades were placed on his official transcript. The dean of faculty, however, subsequently refused to grant him his

degree because of an "in residence" college requirement for classes satisfying graduation requirements. Apparently the faculty and administrators who had advised Blank had been unaware of the "in residence" requirement. The court ordered Brooklyn College to grant him his degree because he had complied with the advice of the institution's agents. The court gave the following explanation for its decision:

> The petitioner acted in obvious reliance upon the counsel and advice of the staff of the college administration to whom he was referred and who were authorized to give him such counsel and advice. (p.802)
>
> The Dean of Faculty may not escape the binding effect of the acts of his agents performed within the scope of their apparent authority, and the consequences that must equitably follow theretofore. Having given permission to take the subject courses in the manner prescribed, through his agents, . . . he cannot, in the circumstances, later assert that the courses should have been taken in some other manner. (p. 803)

In Healy v. Larsson (1971), the student, upon transfer, had consulted with guidance counselors at a community college about what courses would be necessary to complete his degree. He satisfactorily completed the courses he had been advised to take but was denied his degree because he had not taken all of the courses required for his area of concentration. The court ruled that the student must be given his degree because he had adhered to the advisement of an agent of the institution. The student should not be penalized for what was clearly an institutional mistake. The court maintained

that a public community college must honor its implied contract, a contract which could reasonably be construed to provide that if the student followed the advice of the college through its agent and completed the courses he was advised to take, he would be granted his degree.

Although not specifically based on contract, a similar case, Olsson v. Board of Education (1980) was also won by students for reasons similar to those given in Blank (1966) and Healy (1971. In contrast, however, an Illinois court did not render a favorable decision for the student in a contract claim which partially involved oral promises (Abrams v. Illinois College of Podiatric Medicine, 1979). In Abrams (1979), a learning disabled student was dismissed for academic reasons because he failed one class the first semester and two the second semester. He claimed breach of contract on three accounts. The first was that, according to contract terms in the student handbook, he should be permitted to take reexaminations on all three tests, instead of just one. He further claimed that the student handbook provided for periodic feedback on his academic program, supplemented by suggestions for improvements, but he never received these suggestion. He claimed the third reason for breach resulted from oral assurances by college officials that they would help him to succeed in spite of his disability.

The court found that the catalogues only permitted one reexamination and that the feedback mentioned in the Student Handbook merely expressed an intention or hope, not a promise. Regarding the oral promise to help him succeed, the court found that the promises were too vague and indefinite to be binding on the college. Apparently, this court was unwilling to rely on alleged vague oral promises by institutional agents in a case where academic dismissal was the primary issue.

In the cases of both Blank (1966) and Healy (1971), whose lawsuits had been successful regarding oral promises of institutional agents, neither had involved the issue of academic dismissal. The primary issue had been whether the institution should be held to the inaccurate oral promises of its agents. In Healy (1971), the student had received high marks in both classes but had not taken the classes in residence because he had been advised this was not necessary. In Blank (1966), the student had discussed his transfer and course requirements in advance and had carefully followed the proffered advice, successfully completing all suggested work. Unlike the student in Abrams (1979), neither litigant had attempted to show a change in requirements because he had failed or to use vague promises as a pretext for readmission.

Changes or Additions to Academic Requirements or Standards

Another issue which had traditionally served as a general source of heated debate and antipathy between students and public and private colleges and universities involved changes in course requirements or academic standards after the student had enrolled such that the institution withheld the degree or denied the student the opportunity to continue enrollment. This remained a topic of serious concern in the 1970s. Because most American college students always had considered the catalogue requirements at the time of admission to their colleges as binding and unchangeable throughout their tenure as students, students in the late 1960s and early 1970s were equally convinced that this rule of thumb was law. Some claims regarding changes in academic requirements or standards relied on breach of contract; others relied on slightly different approaches. Regardless of the approach taken, all of the cases point out the invalidity of this assumption.

The institution's refusal to grant a degree had compelled students to sue for breach of contract in earlier cases, namely People ex re. Cecil v. Bellevue Hospital Medical College (1891), Baltimore University v. Colton (1904), Burg v. Milwaukee Medical College (1906), and State ex rel. Nelson v. Lincoln Medical College (1908). Healy (1971) had also involved the issue of degree withholding. However, cases in the 1970s were litigated using the new consumer slant which

based redress not on claims of arbitrary and capricious behavior but on failure of the institution to honor the program standards in effect at the time of admission to the program.

Provided the student was able to sustain the burden of proof, the courts had responded sympathetically in cases where the issue was whether the institution was required to adhere to the personal assurances of authorized institutional agents made before the students entered (Healy, 1971; Blank, 1966). More commonly, students based their claims of breach of contract on charges that institutional changes in the general rules governing their academic programs after admission had placed them at an unfair advantage. Under this circumstance, students were unsuccessful. Such was the case in Mahavongsanan v. Hall (1976), a significant decision of the U. S. Fifth Circuit Court of Appeals which is representative of the present-day court's disposition in contract cases where students challenge a change in degree requirements in the interim between their enrollment and graduation.

Mahavongsanan, a graduate student seeking a masters degree in education at Georgia State University, had almost completed all of her course work when the institution added a comprehensive examination requirement. Although she had successfully completed her course work, she took the examination twice and failed both times, at which time

Georgia State University offered to permit her to take additional course work in lieu of the examination. She refused and filed suit for her degree. She claimed breach of contract and denial of her procedural and substantive due process rights under the 14th Amendment. The federal district court enjoined the institution from withholding her degree.

Subsequently, the university awarded her the degree and filed an appeal with the Fifth Circuit Court of Appeals. In the appeal, the school contended that even though the degree had been awarded, the issue was not moot because its academic integrity remained in jeopardy. The university further contended that because the award of a diploma symbolized public endorsement of achievement and competence, Mahavongsanan's court-mandated, unmerited degree, which would be revoked if the appeal proved successful, continued to erode its overall academic certification process.

The court dismissed the student's claims of violation of her procedural and substantive due process rights because she had been notified in a timely fashion of changes in graduation requirements and because she was not entitled to a hearing before her academic dismissal. With respect to the student's claims of breach of contract, the U. S. Fifth Circuit Court of Appeals determined that inherent in the contract between the student and public university was the understanding that the university could be reasonably

expected to make needed changes in curriculum requirements. These changes would not constitute a breach. The court further observed that

> the university clearly is entitled to modify [professional preparation programs] so as to properly exercise its educational responsibility. See Foley v. Benedict, 1932, 122 Tex. 193, 55 S.W. 2d 805, 810. The appellee's claim of a binding, absolute unchangeable contract is particularly anomalous in the context of training professional teachers in post graduate level work. (p. 450)

Therefore, the district court's ruling in favor of the student was overturned.

Other students who experienced similar problems with changes in degree requirements and academic standards in the interim between enrollment and graduation took their battles to court in the 1970s; however, Mahavongsanan (1976) remained the most definitive court statement on the matter in suits for breach of contract. Students who used other approaches were equally unsuccessful in convincing the courts to grant degrees because of changed requirements (Holloway v. University of Montana, 1978; Kaelin v. University of Pittsburgh, 1966). On the related issue of changes in minimum standards, the courts in Schoppelrei v. Franklin University ((1967) and Atkinson v. Traetta (1974) viewed such changes as part of the broad discretion accorded institutions in determining scholastic standards. These student litigants were also unsuccessful.

In one unusual case, however, the court did not uphold the institution. In Novato v. Sletten (1977), a medical school student who had resigned during his residency was sued by the medical school for the training costs incurred during the partially completed training program. The student had resigned because the school had extended by 6 months the length of the original training program. Because the school had breached the agreement first, the student was not held liable for training costs, but the ruling in Novato (1977) was atypical and likely due to the specific pattern of the case. On the whole, the court's ruling in Mahavongsanan (1976) that institutions are permitted to determine scholastic standards and change them when necessary was the general rule regarding the institution's right to frame academic requirements.

Academic Dismissals or Degree Denials

Student dismissals resulting from poor academic performance or denial of degrees for academic reasons had always been a source of conflict between students and higher education institutions. The 1970s were certainly no exception to that trend. The major difference was that students also chose breach of contract rather than the usual arbitrariness, capriciousness, or abuse of discretion as the cause or one of the causes of action. As with complaints alleging the usual causes, complaints alleging breach of

contract were unfavorably received by the courts. Few students were actually successful in forcing institutions to reinstate them or confer their degrees. As in the past, the courts generally deferred to the institution where judgments about a student's academic competence was the issue (Connelly v. University of Vermont and State Agricultural College, 1965).

Because the courts after Dixon (1961) were more sensitive to due process rights, students dismissed for academic reasons in both public and private postsecondary institutions began to couch their complaints in terms of violation of substantive and procedural due process according to the implied or expressed terms of their contracts. In cases of due process violations, the courts also held institutions responsible for substantially observing and uniformly following their own procedural regulations and substantive guidelines for academic or disciplinary dismissals. Private colleges and universities were not constitutionally required to create such guidelines; however, once published, they were contractually obligated to abide by them. In contrast, public colleges and universities were held to a stringent constitutional standard of due process in disciplinary cases, but according to the United States Supreme Court in Board of Curators, University of Missouri v. Horowitz, (1978) they too were not required to provide full constitutional procedural

due process in cases involving academic dismissals, failure to promote, or failure to confer degrees.

A complete listing of all the academic cases involving dismissals or failure to confer degrees where claims were based on breach of contract would be lengthy and repetitive. Some cases which relied on breach of contract claims alleged that, in violation to their contract, the institution dismissed them arbitrarily and capriciously or in bad faith. Representative examples are Mustell v. Rose (1968), Militana v. University of Miami (1970), Gaspar v. Bruton (1975), and DeMarco v. University of Health Sciences (1976). Jansen v. Emory University (1977) is illustrative of suits that claim students were summarily dismissed with no opportunity for a fair hearing.

The arguments on the substantive issues of the dismissal tend to cover several broad areas. Disputes about ways of determining grades or grade computation resulted in several lawsuits. Some of the more illustrative include Balogun v. Cornell University (1971), Watson v. University of South Alabama College of Medicine (1979), Shields v. The School of Law, Hofstra University (1980), and Johnson v. Sullivan (1977). Assorted other complaints involved imposition of conditions not in the contract (Giles v. Howard University, 1977), failure to provide tutorial seminars as outlined in the school bulletin (Abbariao v. Hamline University of Law, 1977), and violation of implied and express contract rights

regarding academic dismissals (Sofair v. State University of New York Upstate Medical Center College of Medicine, 1978). Other complaints involved failure to grant a degree after completion of the required number of credits (Paulson v. Golden Gate University (1979) and failure to grant a homosexual seminary student a degree after completion of all course work (Lexington Theological Seminary v. Vance, 1979). Though not exhaustive, these cases present the general thrust of most cases and provide the tone and flavor of cases presented to the courts in breach of contract in cases of academic dismissal or denial of degree.

In cases involving institutional decisions about academic dismissals, courts were generally in line with the Connelly (1965) decision where the court had determined that

> a student dismissal motivated by bad faith, arbitrariness, or capriciousness may be actionable. (p. 159)

Courts in the 1970s, in lawsuits for breach of contract, were equally as reluctant to interfere with institutional judgments about academic competence unless bad faith, arbitrariness, or capriciousness could be shown. The court's decision in Militana v. University of Miami (1970) was a good example of this reluctance.

In University of Miami v. Militana (1966), the student was placed on probation but was allowed to return for the fourth year of medical school. His continuation was contingent on satisfactory completion of the work in the two

courses he had failed in the third year and successful performance on the two re-examinations. The student passed only one examination and was dismissed during the fourth year for academic deficiency. He sued for reinstatement, and the trial court ordered the institution to promote the student in accordance with conditions printed in the school's catalogue.

The institution appealed, and District Court of Appeals of Florida reversed the trial court's decision, favoring the institution and upholding its discretion. Meanwhile, the student who had been promoted in accordance with the trial court's original ruling had completed the graduation requirements during the appeal process. The institution refused to grant his degree. In the companion case, Militana v. University of Miami (1970), the student filed suit asking the court to grant his medical degree. The District Court of Appeals of Florida found that the original dismissal had not been arbitrary, capricious, or prejudicial. Since the student had not passed all the academic requirements established by the institution for promotion to and completion of the fourth year, the institution was justified in denying the degree. Therefore, the school had not breached the contract.

The student in Mustell v. Rose (1968) had claimed that his due process rights had been violated because he was not present when the decision to dismiss him from the University of Alabama Medical School had been made. He further

contended that, when averaged together, his cumulative grade point average was passing. The Supreme Court of Alabama categorically refused to order the school to readmit the academically dismissed medical student, affirming that procedural due process was not required in academic dismissals. Absent arbitrary or capricious conduct on the part of institutional officials, the court determined that the institution was entitled to exercise absolute discretion in determining academic competence.

Although the trend in court decisions concerning breach of contract in academic dismissals was to almost uniformly affirm the discretionary power of institutional officials, occasionally a student did prevail. Such was the case in De Marco v. University of Health Sciences/the Chicago Medical School (1976). This case, however, was a highly controversial decision which was protested by officials in the Association of American Colleges. The specific facts of the case likely led to the decision for the student.

De Marco, a hospital administrator, did not wish to practice medicine at the time he entered the breach of contract suit against the Chicago Medical School. Thirty years earlier he had entered and successfully completed all but 6 weeks of medical study when officials were told by the draft board that he had earlier attended another unaccredited medical school for a short time before enrolling at Chicago. He was dismissed in 1941 for not informing the school of this

fact. He was reminded also that he had not made a $500 contribution to the school as he had promised to do and as all the other students had done.

At the time of his dismissal, De Marco was due to receive his Bachelor of Medicine degree in 6 weeks and his Doctor of Medicine degree after completion of a year of internship. At that time, no board examinations were expected or required. He alleged that the dean of the school had informed him that after completion of his military service, provided he was honorably discharged, he could be readmitted. When he attempted to reenter at the close of the war, he was refused. Subsequently, over the next 30 years, he made repeated attempts to reenter and even made sizable financial contributions to the medical school, as suggested by subsequent deans, but to no avail.

In 1970, the plaintiff was finally readmitted on a special agreement that he pass Parts I and II of the National Board Examination and complete 48 weeks of clinical work. He failed the clinical work, but was allowed to repeat it. His work was satisfactory the second time. He also took Part I of the examination and failed it, but was permitted to take it again. Instead of retaking Part I of the examination, he filed suit for breach of his 1941 contract with the school, citing the academic requirements in that year as governing his contract. He claimed he had met all the 1941

requirements before he had been unfairly dismissed and prevented form continuing his year of clinical practice.

The trial court agreed that the institution had not acted in good faith when it had dismissed the student for such a minor infraction and further imposed a financial contribution on him. The court ordered the student not to take the examinations and ordered the institution to award his degree. The medical college appealed the decision.

On appeal, the majority opinion of the Illinois Appellate Court, First District, affirmed the trial court's decision to award the degree. The court, however, reversed the order requiring the student not to take the examinations. According to the court's majority it was for the plaintiff to decide whether or not he wished to take the examination for a license and for the examining board to determine whether or not he was qualified to practice medicine.

In his dissent, Judge Adesko opinion spoke directly to the traditional practice of the courts which supported the conventional wisdom of Anthony (1928):

> Certainly any rights plaintiff may have had in 1944 have been lost during the 30 years interim. In no case cited by the plaintiff has the court awarded equitable relief under even remotely similar circumstances. Plaintiff makes no claim of fraud or duress. Nor does he assert that the terms of the special agreement were ambiguous or misunderstood. By requiring plaintiff to pass the National Boards, the school asked only that he demonstrate current medical knowledge commensurate with the distinguished degree he sought. That he somehow should be

> excused from this or other academic requirements is meritless. (p. 368)

Suits entered for breach of contract which asserted that terms of the educational contract printed in the college bulletin or other written documents guaranteed that students would not be dismissed without procedural due process were unsuccessful in academic dismissal cases. Jansen v. Emory University (1977) is exemplary of the court's disposition toward such claims in private colleges and universities. The previously discussed decision of the U. S. Supreme Court in Board of Curators, University of Missouri v. Horowitz (1978), which did not require full procedural due process in academic dismissals, remained the definitive precedent regarding public colleges and universities.

In Jansen (1977), an Emory University dental student on academic probation claimed breach of the educational contract when he was dropped from the school for academic failure shortly before graduation even though his graduation papers had been signed by the dean. His poor grades in his last year of clinical practice combined with past poor academic performance had resulted in his dismissal. He further contended that former disciplinary infractions for honor code violations had materially affected his overall academic performance and that the academic decision to dismiss him was affected by these disciplinary infractions. He claimed breach of contract because the bulletin of Emory University guaranteed that students would not be dismissed without

procedural due process of law. The U. S. District Court, North District of Georgia, cited Mahavongsanan v. Hall (1976), a Fifth Circuit Court of Appeals decision, as controlling:

> The plaintiff has alleged that his dismissal was arbitrary and capricious and thus, even if based on academic considerations, reviewable as a breach of substantive due process guaranteed by the Emory contract. Nothing in the record supports this allegation. . . . As Mahavongsanan mandates, courts are not empowered to review the manner of grading students and setting of degree requirements. (p. 1063)

The result was the same as in Mahavongsanan (1976); the court refused to intervene, and the student's dismissal was upheld.

In cases where clearly visible evidence of abuse of discretion could be presented, judges were willing to enter controversies involving discriminatory grading practices or arbitrary evaluations of student work. In Balogun v. Cornell University (1971), a veterinary student was not successful in convincing the court that he had been the subject of discriminatory grading practices. Balogun alleged that, according to his contract, he had passed all requisite courses, had met residency requirements for a veterinary degree, and had met the grade point standard established in the New York State College bulletin, but the veterinary college had withheld his degree.

According to Cornell's Veterinary College, at the end of his senior year, Balogun had not been granted a degree or

allowed to reregister because he had ranked last in his class and his overall grade point average had been well below 2.0. Furthermore, his clinical skills in the last two semesters of clinical work had been extremely deficient. Moreover, his poor performance in the critical clinical portion of his curriculum had resulted in his rank of 54 in a class of 54 at the end of his senior year.

Balogun further claimed he had been discriminated against because he was black and because additional grade requirements had been added to those graduation requirements listed in the bulletin. The published statements about scholastic requirements stated that a weighted average of 70% was needed for passing. The bulletin did, however, contain a reservation clause which gave the institution the right to determine the precise standard needed for graduation, especially where the student's record and potential were concerned.

Evaluating the merits of the case, the Supreme Court of New York determined that

> there is no showing that denial of plaintiff's degree was arbitrary, capricious, or in any way discriminatory. The unrefuted evidence is standard procedures of review of academic achievement and professional potential were equally applied to all members of Mr. Balogun's class and that the decision to withhold a degree from him resulted from the rightful exercise of honest discretion based upon justifying facts. Abuse of discretion and gross error has not been shown. (pp. 841-42)

The Balogun (1971) decision was entirely consistent with the New York Supreme Court's definitive ruling in Carr (1962) which had called for the exercise of honest discretion in disciplinary dismissals.

The prescribed method of grade computation was the subject of an unsuccessful challenge to an academic dismissal in Watson v. University of South Alabama College of Medicine (1979). The student claimed that his contract with the medical college had been breached when the college had failed to follow its published standard for failure of course work. Since the student had achieved an overall average of 65.13 and the college bulletin had stated 65 as the lowest passing grade for a single course, the student contended he should not have been dismissed after his first year. The court held for the college. It found that the standard for a single course did not represent "a measure by which the average of all such grades is to be compared" (p. 726).

Computation of cumulative averages was also the issue in Johnson v. Sullivan (1977) and Shields v. the School of Law, Hofstra University (1980). In both suits against law schools, the student wished to have failing grades removed from the academic records when the course was retaken and passed. In both instances, the law schools refused to remove the failing grades. Although it was the usual university policy to do so in the former and in accordance with alleged oral promises by the assistant law school dean in the other,

both law schools included the failing grades in computation of overall academic performance, resulting in academic dismissals. Both courts upheld the schools, finding no arbitrary or capricious action in Johnson (1977) or abuse of academic discretion in Shields (1980).

When the institution acting in good faith did not completely follow an established policy for dismissal because it was trying to provide extra chances for the student to compensate for deficient work, the court ruled in favor of the institution. In Giles v. Howard University (1977), a marginal student claimed breach of contract because the university had imposed special conditions on him which resulted in his dismissal from the medical college. He alleged that the university had not specifically followed the student promotion policy's guidelines governing the directed study program, a program designed to help students compensate for academic deficiencies. The university contended that, in an attempt to help the student remain in school, it had repeatedly continued to allow him to make up his deficient work, placing new conditions on his continuation. It further contended that although these specific conditions were not itemized in the student promotion policy, they constituted a reasonable exercise of discretion taken to help the student and still maintain the necessary academic standards.

The United States District Court, District of Columbia, upheld the institution, recognizing Howard University's right

to terminate students in cases of academic deficiency because the student's contract at Howard contained a reservation clause permitting such termination. The court also interpreted the contract to determine what the disputed policy meant. It examined the reasonable expectations of both parties regarding the student promotions policy and determined that Giles could reasonably expect that if he failed to make up a deficiency, the institution could either dismiss him or place additional conditions on his continued attendance. The court held that

> under this interpretation, the plaintiff has failed to adduce any evidence of a violated contract right. He has also failed to present any facts to show improper motivation or irrational action on the part of the University or any of its officials. On the contrary, all of the evidence indicates the University went out of its way to help plaintiff remain in medical school without compromising its academic standards. It gave him at least three "second chances." (p. 606)

Similar reservation clauses were upheld by the Supreme Court of Minnesota in another dismissal case, Abbariao v. Hamline University of Law (1977). Abbariao contended that when he was admitted to Hamline's predecessor before merger, his contract promised special tutoring to all students. After affiliation with Hamline, his contract had been violated when tutoring was cancelled. Among other reasons, Abbariao maintained this was the reason for his academic deficiency. The court held for the school, relying on a

reservation clause which permitted the school to change programs without notice.

Again in Sofair v. State University of New York Upstate Medical Center College of Medicine (1978), the Court of Appeals of New York relied on the reservation clause to uphold the dismissal. The student was evaluated by the faculty and dismissed for failure to demonstrate sufficient clinical knowledge for the practice of medicine. This had occurred after imposition of special requirements for continuing unsatisfactory performance. Sofair contended that dismissing him without an opportunity to complete all special requirements was a violation of the implied and express terms of the contract. He further argued that the college had used an arbitrary evaluation system and had notified him of dismissal the same day as his hearing, precluding any opportunity for him to prepare for the hearing. Because the terms of the contract included a clause allowing the school to dismiss for due cause, including poor academic performance, the dismissal was not deemed a violation of the contract's express or implied terms. The court found that his dismissal was based on the staff's legitimate concern for safeguarding the fitness of its medical graduates.

In a similar case, a California court also found no breach of contract in Paulsen v. Golden Gate University (1979). Here the court determined that allowing a law student who had failed to meet graduation requirements at the

end of 3 years to take extra classes during an additional 4th year so that he would be eligible to take the bar examination did not obligate the school to award him a degree. The court reasoned that the contract for the 4th year included a condition that no degree would be given at the end of the additional year even if the student had sufficient credits and his overall grade point average met minimal standards.

Disciplinary Dismissals

Students in the 1970s traditionally had almost as much difficulty winning lawsuits in disciplinary dismissals as they had in academic dismissals unless they could prove that the defendant institution had failed to comply with the due process requirements mandated by constitutional provisions or expressed or implied in contractual provisions. Although the constitutional requirements established in Dixon (1961) were inapplicable to private institutions, many private institutions also had made conscious policy decisions in the 1960s to use the constitutional notice-and-opportunity-for-hearing concept as a guideline for developing new fairer policies for disciplinary dismissals. Revised codes of conduct and dismissal policies and regulations were outlined in school bulletins, catalogues, and printed regulations, binding both students and institutional officers for discipline. When students believed institutions had not followed the contract and had unfairly or arbitrarily

dismissed them, they frequently turned to the courts. Generally public college and university students relied on constitutional grounds, whereas their counterparts in private institutions claimed violations of their procedural or substantive rights on contractual grounds.

One of the most successful approaches employed under the umbrella of consumer rights was presented in cases which argued that the private institutions had deviated from printed dismissal regulations and procedures, a clear violation of due process. Representative cases included Tedeschi v. Wagner College (1980), Kwiatkowski v. Ithaca College (1975), Winokur v. Yale University and Mason v. Yale University (1977), Pride v. Howard University (1978), and Krawez v. Stans (1969). Other relevant disciplinary dismissal cases which made different claims that were based on contractual obligations were Green v. Howard University (1967), Slaughter v. Brigham Young University (1975), Swanson v. Wesley College (1979), and Andersen v. Regents of the University of California (1972).

In cases involving failure of institutions to follow established written procedures published in the catalogue for disciplinary dismissals, the courts ruled in favor of students who could show proof of their allegations. Proof was, however, extremely difficult to produce in most cases. The specific issue in Tedeschi v. Wagner College (1980) was a student's disciplinary dismissal for disruptive behavior

which was largely the result of emotional disturbance. Realizing her emotional state, the dean met with her informally, and she was subsequently suspended. This dismissal procedure did not completely follow the private institution's procedural guidelines for a non-academic suspension because the guidelines called for a hearing before the student-faculty board. Although the institution was private and not bound by constitutional safeguards, the majority of the court of appeals ruled that school officials must strictly adhere to the school's set of procedural safeguards. It ruled that the institution must reinstate the student in the next semester unless she was given a hearing before the student-faculty board.

In a similar case, Kwiatkowski v. Ithaca College (1975), the court granted the student another hearing because the institution had dismissed the student without adhering completely to its judicial code which permitted students the right to attend both initial and appeal hearings with legal representation. The student had been suspended without benefit of attending the appeal board hearing or having his legal counsel present.

In contrast, the court ruled for the institution in Winokur v. Yale University and Mason v. Yale University (1977), a case where two students were suspended and requested reinstatement because of deviations from procedural regulations. The court held that substantial compliance with

the implied terms of the contract did not disadvantage the student by affecting the fundamental fairness of the hearing. Hence, a slight deviation from published procedures did not constitute a breach of contract, and the court would not interfere.

In Pride v. Howard University (1978), the court also failed to support a medical student who claimed his contract had been breached because the university's judiciary board had proceeded to vote on his suspension for cheating without having the required number of members on the hearing board. Two board members had not been present at the time the board had voted to suspend Pride; one had already graduated, and the other was absent. The university claimed that the code of conduct was silent about what constituted a quorum, calling only for a majority of its members to be present for such a vote. Pride contended that since two members had not been present when the other six board members had voted on the suspension and only four of those present had actually voted for his suspension, the university had failed to follow the procedures requiring a majority vote in suspension cases.

The U. S. Court of Appeals for the District of Columbia affirmed the decision of the trial court which had ruled that the student's contract had not been breached. In order to decide about the alleged breach, the court had to construe the contract and determine its meaning regarding the proper

constitution of the board. The court gave the following explanation for its decision:

> We deem it unreasonable to read the Code as requiring every member to be present before the board can act. We have no difficulty in concluding that a reasonable person in the parties' position would assume that, consistent with the usual rule of law, the Board could proceed to act if a quorum--normally a majority--were present. (p. 36)

The court further noted that in constituting the board, the university had followed its custom of not replacing graduated board members until the next semester. Seven was therefore the number of members which constituted the entire board at the time of the hearing, and four of the seven, a majority, had voted for suspension. The court could find nothing wrong with the contested procedure, as it was in accordance with the contractual obligation placed on the institution by the code of conduct.

One court upheld students in a breach of contract suit involving a disciplinary dismissal because of deviations from oral promises of institutional agents. Whereas the two previously mentioned cases were based on deviations from written institutional promises and regulations, Krawez v. Stans (1969) was based on deviations from oral assurances regarding dismissal proceedings. Cadets at the United States Merchant Marine Academy were successful in establishing that oral agreements reached with narcotics agents regarding use of their testimony in disciplinary proceedings constituted a

binding contract which the academy had breached. The cadets had been given assurances that self-incriminating evidence given to narcotics agents would not be used as evidence against them in disciplinary proceedings. Information gleaned from their immunized testimony to narcotics agents was in fact subsequently used to support expulsions for violations of academy regulations. The court prohibited the academy from using the self-incriminating evidence against the students.

In Green v. Howard University (1967), a group of students were expelled for participating in campus disturbances without notice of charges or hearing before their dismissal. They claimed they were entitled to the same constitutional due process rights of notice of charges and a hearing as students in public universities. The court found no merit in this argument. It held that Howard University was private. The only way the court would accept entitlement to constitutional rights was through state action of which it found no evidence. Furthermore, the catalogue of Howard University contained a reservation clause allowing dismissal for "any reason deemed sufficient to the university" (p. 613).

While the case was working its way through the appeals process, the students were allowed to continue school. Before the final appellate ruling, they had graduated, causing the court to dismiss the action as moot. With few

exceptions, other attempts at proving state action in a private university proved equally unsuccessful.

In Slaughter v. Brigham Young University (1975), the U. S. Tenth Circuit Court of Appeals refused to accept a signed application of commercial contract in the disciplinary expulsion of a doctoral student. Basing its decision strictly on contract theory, the federal district court had rendered a judgment upon a jury verdict which awarded the plaintiff $88,283.83 in damages for his dismissal. The dismissal had occurred when the university had discovered that in order to increase his chances of publishing two articles in professional journals, Slaughter, had added his advisor's name to these articles without authorization. The university claimed Slaughter's actions were a violation of the code of student conduct regarding honesty. Slaughter maintained he had substantially complied with the code. The Tenth Circuit Court of Appeals determined that the actual question to be resolved was whether the student's unauthorized use of his advisor's name was a violation of the code of student conduct regarding honesty. It determined that it was. Commenting on the error in the trial court's application of rigid commercial contract doctrine, the U. S. Tenth Circuit Court of Appeals observed that

> in its strict contract application, the trial court instructed [the jury] that only "substantial" compliance by plaintiff with the Student Code was required. By this "substantial" compliance standard, the jury was in effect instructed that a

> little dishonesty would not matter. This cannot be the measure and the court cannot so modify the Student Code. (p. 627)

The Tenth Circuit Court further explained its decision:

> The trial court's rigid application of commercial contract doctrine advanced by plaintiff was in error, and the submission on that theory alone was error. . . .
>
> It is apparent that some elements of the law of contracts are used and should be used in the analysis of the relationship between plaintiff and the university to provide some framework into which to put the problem of expulsion for disciplinary reasons. This does not mean that "contract law" must be rigidly applied in all its aspects, nor is it so applied even when the contract analogy is extensively adopted. . . . The student-university relationship is unique, and it should not be and cannot be stuffed into one doctrinal category. (p. 676)

Courts were also unwilling to find for a student who claimed his due process rights had been violated because he did not attend his hearing. In Swanson v. Wesley College (1979), a student who had made threats to the life of a fellow student was permanently suspended. He filed suit claiming his dismissal was a violation of due process and of his contractual right to an education. The Supreme Court of Delaware upheld the institution, finding that the institution had accorded him basic procedural fairness. Officials had given him notice of the changes and a opportunity to appear at a hearing, even though he did not attend or protest its taking place. Moreover, the court held that his threats had

been a breach of his contract of education. The institution had acted reasonably and fairly in dismissing him.

Although most lawsuits involving disciplinary dismissals based on contractual rights were filed against private institutions, in one case a student from a public university also attempted to use this approach. In Andersen v. Regents of the University of Southern California (1972), the student's claim was that he had a contract with the university which obligated it to continue his enrollment until graduation. The court was unsympathetic to his claim.

The 1980s: Conservatism Revisited

The latest period of change since World War II began in 1980 with the landslide victory of "Counter-Establishment" conservative, Ronald Reagan. In 1980, Americans elected a president who promised to return America to its rightful place in world affairs. He also offered a return to traditional values and religious beliefs. Foremost, he projected an image of enthusiasm, confidence, and optimism.

The election of Ronald Reagan represented the culmination of a gradual shift in American social, political, and economic values. According to Ferguson and Rogers (1981), the decisive Reagan victory indicated "that the New Deal system of power no longer defined the shape of American politics" (p. 54). Forty years of New Deal influence had finally been supplanted by a resounding resurgence of

conservative ideology which closely paralleled that of the 1920s. The free market, increases in defense expenditures, decreases in welfare and subsidy programs, and federal deregulation were upheld as the answers to unemployment, inflation, and declining international influence. Laissez-faire economic policies became the guiding principle of the Reagan administration, as it had during the previous conservative administrations of Harding, Coolidge, and Hoover.

The New Right's Agenda

Leaders of the New Right called for an immediate end to flagrant disregard for law and order and curtailment of liberal economic and social policies. They instituted policies which called for vigorous opposition to drug use, abortion, tax increases, and Communism. Leaders of conservative thought also pressed for an end to pervasive federal intrusion into private enterprise, citing substantial deregulation as one of their primary goals. They also diligently fought against federal interference with higher education, encouraging more institutional self-regulation and more resolution of internal conflicts at the institutional level.

Foremost, the new conservative leadership desired to reduce the liberal influences of the media, the press, think tanks, the federal courts, and higher education. Central to

the New Right's program for lasting change was a deliberate effort to curb liberal activism in the federal judiciary. The New Right hoped to stem the tide of the revolutionary Warren Court where liberal activists had concentrated on enhancing individual rights and bringing about social transformation with little regard for private enterprise's liberty to contract. The New Right had hoped instead to increase the conservative directions which had begun with the Burger Court.

With the retirement of U. S. Supreme Court Associate Justice Lewis Powell in 1987, conservatives felt confident that for the first time in 40 years, they had the opportunity to bring a conservative majority back to the Supreme Court. Moreover, with the appointment of conservatives to vacancies in over half the federal bench, the Reagan administration felt it also had successfully restored conservatism to the district and federal appellate courts where many crucial decisions were rendered regarding individual rights. Essentially, the New Right looked to the federal judiciary for help in restoring a proper balance between the rights of individuals and the rights of private business and between the federal government and private enterprise.

Conservatism's Effect on Higher Education

The Reagan administration promised in 1980 and again in 1984 to take government "off the backs" of the American

people. With respect to education, the Reagan commitment to deregulation had ramifications for higher education. In a less regulated environment, both public and private universities were permitted greater self-regulation, hence, greater institutional autonomy. Although greater autonomy was not necessarily synonymous with restrictions on student rights, certainly student status was not enlarged.

The court's common law tradition favoring deference to institutional authority was not likely to become less deferential in the hands of a more conservative judiciary. Like conservative politicians, conservative judges valued a return to the time when authority figures were accorded status and authority. They advocated very little intrusion into internal institutional affairs by the courts or government. To the conservative judiciary, intrusion could only be justified in unusual situations. Under these constraints, the enlargement of student status or sympathetic review of student litigation was restrained.

Student Litigation in the 1980s

After the marked increase in student litigation for breach of contract in the middle of the 1970s, the decline of litigation in the late 1970s and 1980s was a relief to postsecondary institutions. After almost 20 years of enlargement of legally enforceable rights for students, the U. S. Supreme Court began to limit the rights of

postsecondary students. In Regents of the University of Michigan v. Ewing (1985) the U. S. Supreme Court handed down an adverse decision in a case where a university student had attempted to overturn an academic dismissal through focus on substantive due process rights. Earlier in Board of Curators of the University of Missouri v. Horowitz (1978), the U. S. Supreme Court had handed overturned a similar academic dismissal based on procedural process. Academic dismissal cases in 1986 in the U. S. First Circuit Court of Appeals (Amelunxen v. University of Puerto Rico, 1987), the Third Circuit (Mauriello v. University of Medicine and Dentistry of New Jersey, 1986), the Eighth Circuit (Schuler v. University of Minnesota, 1986), and the Tenth Circuit Harris v. Blake, 1986), to name a few, indicated that federal courts were becoming increasingly less sympathetic to both procedural and substantive due process claims in academic dismissal cases.

When students switched the approach to breach of contract rather than violations of due process in cases of academic dismissal or denial of degree, institutions continued to be upheld. This was the case in Marquez v. University of Washington (1982), Patty Ann H. v. New York Medical College (1982), and Neel v. Board of Trustees (1982). The institution also was upheld in a breach of contract suit where the student attempted to force the faculty to write recommendations for her entrance into its doctoral program (Woodruff v. Georgia State University, 1983).

At both the trial and appellate levels, the court in Marquez v. University of Washington (1982) also ruled in favor of the institution in an academic dismissal case involving rounding off grades and failure to provide tutorial service. The student in Marquez (1982) claimed that the University of Washington Law School had breached its contract by failing to round up his grade point average, resulting in his dismissal. Furthermore, the school had failed to provide formal tutorial aid as described in the prelaw handbook.

The institution asserted that the minimal average for continuation in law school was 68 and that the student had earned only a 67.725 average. The university further maintained that the prelaw handbook provided for academic aid to students and that such aid was available on an informal basis from faculty members, should students avail themselves of it. Although a formal structured tutorial program had been in effect at the time of Marquez's enrollment, the institution asserted that the informal program which had replaced it continued to satisfy the handbook provision.

The Court of Appeals of Washington in Marquez (1982) found no breach of contract. It agreed that the handbook provision did not bind the institution to any specific form of academic aid. The court also found that the school had followed its own rules and procedures regarding computation of the grade point average. It was not required to round up the grades.

In Heisler v. New York Medical College (1982), the trial and appellate courts disagreed on what constituted abuse of institutional discretion and arbitrariness regarding academic dismissals. Heisler (1982) involved a student who claimed that the college had breached its contract when it dismissed her for academic reasons, but allowed three others who had also failed the maximum number of allowed courses to return and repeat their failed work. The college guidelines for promotion and admissions had stipulated mandatory dismissal for all students who fell below certain standards. Concerning the issue of failure to adhere to established procedures and failure to apply standards to all students equally, the New York Supreme Court, Special Term, held that

> when a school deviates from its rules and makes exceptions thereto, it must employ some understandable, unified standards. The failure to establish and maintain such standards constitutes an impermissible abuse of discretion and lack of good faith on the part of the educational institution. (p. 837)

The New York Supreme Court, Appellate Division, however, reversed the lower court's order to readmit the student for the subsequent year (Patti Ann H. v New York Medical College, 1982). The appellate decision was based on the grounds that New York statutory law had established that the board of regents would provide administrative remedies for students in promotion cases, and Heisler had not exhausted all other remedies before resorting to court action. Moreover, after reviewing the case, the appellate court determined that

> the college's decision did not demonstrate bad faith, arbitrariness, or irrationality. It was based on a proper and legitimate, though subjective, judgment rendered within a professional and academic milieu. (p. 199)

The Heisler appellate decision reflected the court's traditionally conservative tendency to avoid interfering in cases involving the substitution of the court's expertise for that of educators with respect to judgments of academic competence or academic standards. It also emphasized the importance of exhausting all administrative remedies before seeking judicial redress.

In Neel v. Indiana University Board of Trustees (1982), the Court of Appeals of Indiana, Second District, affirmed the decision of the superior court which had upheld the dismissal of a dental student who had been dismissed because of poor academic and clinical performance and excessive unexcused absences from clinical practice. The student had alleged that the school had breached its integrated contract when it failed to follow the detailed disciplinary procedures for dismissal set forth in the university's student rights and responsibilities handbook where no mention was made that three absences would result in his dismissal. He further contended that his dismissal without a formal hearing was a denial of due process.

The Court of Appeals of Indiana distinguished that the handbook relied upon by the student referred to disciplinary dismissals and not academic dismissals. The court

acknowledged that the handbook did not specify absences as a cause for dismissal. However, students were cautioned in the handbook that information about academic requirements could be found in other academic bulletins. The court pointed out that the dental school bulletin did stipulate that the third absence from clinical practice would result in academic dismissal. The court acknowledged, however, that the bulletin's criteria for academic dismissal did not specify unexcused absences as a cause for dismissal.

In reaching its decision, the appellate court did not recognize any one document as the only source of the dental school's student-institutional contract. It looked at the student promotion policy, institutional by-laws, and procedures specified in the dental school bulletin. In interpreting the dismissal policy, the court used instead the Giles (1977) standard of reasonable expectations of the parties. The court reasoned that the institution had substantially complied with the bulletin's procedures, and that the student could reasonably have expected dismissal in light of the repeated academic warnings and unexcused absences. Moreover, regarding the denial of due process, the court relied upon the U. S. Supreme Court's decision in Board of Curators, University of Missouri v. Horowitz (1978) which did not require a formal hearing in academic dismissals.

In Woodruff v. Georgia State University (1983), the institution also prevailed in a lawsuit which alleged breach

of contract as one of the claims. In this case, a graduate student attempted to force her former professors to write recommendations for her entrance into a Georgia State doctoral program, alleging that the faculty and the institution had slandered her and had conspired to withhold the necessary recommendations to prevent her entrance into the doctoral program. She contended that a previous incident involving plagiarism had resulted in sarcasm and hostility on the faculty's part. The faculty members contended that although the student was "argumentative and troublesome" (p. 233), their refusal was based on her previous erratic academic performance and not conspiracy or personality considerations.

The Supreme Court of Georgia considered this dispute to concern evaluations of the student's academic qualifications for advanced study. It ruled that disputes regarding the academic decisions of public universities were not justiciable controversies. Reflecting the national trend toward deregulation of education in the early 1930s and its return in the 1980s, the Supreme Court of Georgia made this comment:

> Almost fifty years ago, this Court diverted from the University System of Georgia the encroaching hands of the executive and legislative branches. State of Georgia v. Regents of the University System of Georgia 179 Ga. 210, 218, 175 S.E. 567 (1934). . . . Absent plain necessity impelled by a deprivation of major proportion, the hand of the judicial branch alike must be withheld. (p. 234)

Obviously, the court did not deem Woodruff's complaint as a deprivation of such gravity that it merited judicial activism on her behalf.

Although the courts were reluctant to intervene in academic dismissals, when the issue of violation of civil rights entered the controversy, the courts were much more likely to review carefully the actions of the institution. In Yakin v. University of Illinois (1981), the U. S. District Court for the North District of Illinois found that, based on an affirmative action document distributed by the department, a Mexican doctoral student who had been terminated for academic deficiencies could state a breach of contract claim for which relief could be granted. The contract was based on a document entitled "Program for Graduate Educational Opportunity (GEO)" which provided that students under the GEO program would not be evaluated by traditional standards and that course and program requirements and schedule guidelines would be administered in a flexible manner in order to assist them.

The student in Yakin (1981) had been terminated by the department for poor academic performance at the end of the first year. However, he had appealed, and, in accordance with GEO provisions, he had been allowed two extra quarters to prepare for his qualifying examinations. When he had failed the doctoral examination, the faculty had terminated the student, denying him the opportunity to retake the

examination. The institution contended that it had not discriminated against the student and that the GEO program standards had been properly applied.

The doctoral student had filed suit for breach of contract, complaining that he should have been extended all of the services described in the GEO documents. The U. S. District Court for the North District of Illinois upheld the student, finding that the student was entitled to relief.

In Aronson v. North Park College (1981), a student's dismissal was upheld for reasons reminiscent of Anthony (1928) and Carr (1962). A clause in the catalogue reserved to the school the right to dismiss at any time without a specific charge any student who was undesirable or whose continuation was deemed detrimental to himself or to other students. Aronson had been dismissed after the college had determined that her mental health was not strong enough for her to continue her studies. The private college had determined that she posed a serious detriment to herself and others after it had administered the Minnesota Multiphasic Personality Inventory to all students. Counselors and an independent psychologist had used the test results and brief contacts with Aronson to diagnose her condition as paranoid.

When Aronson had refused to submit to psychiatric counseling, the college had notified her that she was dismissed. She sued for breach of contract, claiming that the college had acted arbitrarily and capriciously. Because

the catalogue contained a reservation clause, the Illinios Appellate Court, First District, held that the college's dismissal did not violate the contract. It had not acted improperly or in bad faith.

Although academic dismissals and revocation of degrees occupied more of the time of courts in the 1980s, tuition disputes continued to be of concern to students. In Prusack v. State (1986), a tuition increase dispute, the court continued to consider decisions about tuition policies as part of the wide discretion of institutions. Like the earlier decisions in Basch (1977) and Eisele (1978), the New York Supreme Court, Appellate Division, found no breach of contract when the State University of New York at Stony Brook had increased tuition by 50%. The university bulletins had included a disclaimer that tuition might be subject to change; therefore, the institution was not contractually obligated to charge the exact amount listed in the students' acceptance letters.

In The University of Texas Health Science Center at Houston v. Babb (1982), the student brought action against the institution for injunctive relief from a dismissal that had resulted from application of updated academic standards different from those in the catalogue at the time of her admission. The original catalogue had included a provision that allowed the student to graduate within 6 years under the catalogue provisions governing academic standards at the time

of admission regardless of subsequent amendments. When the student had withdrawn and returned the next term, the institution had applied new standards to the student. According to these revised standards, she had been expelled because of too many failing grades. She filed suit, and the trial court upheld her. As the student in an earlier related case, Mahavongsanan (1976), Babb believed that the additions to the degree requirements after the time of admissions had disadvantaged her and had resulted in her dismissal.

The university appealed the lower court's decision. The Court of Appeals of Texas, First District, upheld the trial court's decision for the student. It ruled that the student had a contractual right to be judged by the terms of the contract at admission especially in light of the initial contract's clause concerning amended standards.

In the area of disciplinary dismissals, students whose cases were based on breach of contract were no more successful than their counterparts in the 1970s. Two representative cases, Coveney v. President and Trustees of the College of the Holy Cross (1983), and Cloud v. Trustees of Boston University (1983) indicate the courts' continuing hesitance to overturn disciplinary dismissals unless the standard preventing exercise of bad faith, arbitrariness, or capriciousness was not followed.

In Coveney (1983), a student in the last semester of his senior year had been expelled from a private college after he

and two male companions had entered other students' dormitory room and had barred the rightful female occupants from entering, in violation of college regulations which prohibited students from interfering with the rights of fellow students. Coveney sued claiming violation of his contractual and constitutional rights to a hearing. He also alleged wrongful expulsion. His sworn testimony contended that the door had been unlocked upon entrance and denied that he knowingly had barred the door to the rightful owners.

The Supreme Judicial Court of Massachusetts upheld the expulsion maintaining that

> if school officials act in good faith and on reasonable grounds, their decision to suspend or expel a student will not be subject to successful challenge in the courts. (p. 139)

Furthermore, the court found that the private college was not constitutionally required to give Coveney a formal hearing. Even though Coveney had been given two hearings, the college was not contractually required to give him a hearing before expulsion because of student handbook provisions. Moreover, the ground for expulsion was in accordance with rules stated in the student handbook distributed to students yearly.

In another somewhat similar dismissal, Cloud (1983), a student in his last year of law school filed suit to overturn his expulsion for serious misconduct. He alleged that his dismissal was a violation of his contract rights due to the improper conduct of the misconduct hearing and application of

a set of disciplinary procedures different from those which governed the law school.

Cloud had been brought before the judicial committee after four separate incidents where he had been caught

> peeping under the skirts of women students in the university library . . . while [he was] crawling on all fours under tables where the women were seated. (p. 723)

In light of evidence presented of a 1970 conviction for rape and the serious and continuing nature of the offense, the law school had expelled him.

The trial court denied Cloud's action for reinstatement and damages. He then filed an appeal in which he claimed unfair treatment in the disciplinary hearing, violation of his contractual rights to an impartial hearing, and violation of his privacy rights. The U. S. First Circuit Court of Appeals held that application of the university 's provisional student code instead of the law school disciplinary rules was appropriate because the offenses occurred in the university's library, not the law school. Citing the standards of good faith and reasonableness in Coveney (1983), the court also found that the hearing examiner had conducted the 20-hour hearing fairly. The court also found that the college had not violated Cloud's privacy rights by placing the public record of his rape case on file for student review.

Summary

After World War II, few political and social relationships in American society remained the same as before the war. Rapid technological advancement helped to improve the lifestyles of most Americans. At the same time, however, those changes which made possible an improved standard of living also brought about reciprocal changes in the relationships among groups.

In the post-World War II period, the federal bureaucracy continued to "mushroom," and federal statutes and regulations increased, exerting increasing power and influence over almost every aspect of the everyday affairs of American citizens. To counterbalance this trend, the U. S. Supreme Court, once a retroactive agent in the process of change, increasingly became a proactive agent. The Warren Court used the 1st and 14th Amendments to enhance the rights of individuals who had been overlooked by previous activist courts. The major thrust of previous Supreme Courts under White, Taft, and Hughes had been enhancement of private property rights and laissez faire. Overall, individuals gained new rights with respect to government control of their lives.

Once the U. S. Supreme Court had set the pace for legal recognition of individual rights throughout the 1950s, various groups with low status began demanding greater recognition and more power. In the early 1960s students and

racial minorities, heretofore relatively silent, powerless groups, became social and political activists. In the 1960s, they demanded power through improved status and the right to vote. Women, ethnic minorities, environmentalists, and consumers also attempted to change social attitudes and to determine political policy. In the process, traditional ways of relating were destroyed, and new relationships emerged. Traditional authority figures in families, law enforcement, religion, politics, and education were no longer accorded the status and power of the past. Few roles remained the same.

Within this climate of change in the 1950s and early 1960s, the composition of colleges and universities also began to change. Many returning veterans, who never could have attended postsecondary institutions without the financial assistance of the federal government, enrolled in colleges and universities for the first time. Overall, colleges and universities grew rapidly because the boom economy and federal financial aid programs made attendance at postsecondary institutions possible for many middle-class students.

As postsecondary institutions grew and the social context changed, the traditional collegial relationship between postsecondary institutions and their students also evolved. In light of the large numbers of veterans and adults who were attending colleges and universities in the 1950s and 1960s, *in loco parentis* no longer seemed appropriate to characterize

the relationship between students and postsecondary institutions. Most students no longer thought of higher education as a privilege. Many veterans viewed it as a benefit they had earned through military service. Others, including many student activists, viewed public higher education as an inherent right of any American citizen who qualified for entrance. Some constituents of higher education considered it a purchased service. These views were not compatible with the traditional in loco parentis relationship. Like other relationships in society, the student-university relationship was forced to yield to change.

As traditional notions of the student-university relationship were discarded, the privileged status of educators greatly diminished. Students were no longer viewed as wards of the college or as children in need of parental supervision. When the U. S. Fifth Circuit Court of Appeals in Dixon v. Alabama State Board of Education (1961) applied constitutional due process to public postsecondary students in disciplinary dismissals, students gained new status as citizens protected by constitutional safeguards. No longer could public institutional officials dismiss students without notice or a hearing. The relationship between public college and university students was re-defined.

Envious of their counterparts in public postsecondary institutions, students in private colleges and universities

also searched for a way to gain increased status. They "dusted off" the contractual relationship which had remained relatively unchanged since Anthony (1928) and began to press for contractual rights. Although students claiming contract rights won at the trial level in their first effort, they were defeated on appeal (Carr v. St John's University, 1962).

Observant of social change, afraid of appearing unfair to the parents of students, and fearful of alienating past and future financial contributors, private university officials voluntarily made changes. They changed or relaxed some repressive disciplinary regulations and gave students more voice in curricular matters. They hoped that these concessions might defuse student activists who disrupted campus life and who often chose to engage in expensive and time-consuming litigation.

Student activism alone likely could not have produced a major change in the status of students in public or private higher education unless the groundwork first had been established by the Warren Court's activism concerning civil rights and individual freedom. The U. S. Supreme Court's historic ruling in Brown v. Board of Education of Topeka (1954) ended the high court's traditional reluctance to interfere with state control of education. The Brown (1954) decision and other Supreme Court rulings in favor of academic freedom in the 1950s created a climate whereby court interference in cases involving important constitutional

issues was deemed a desirable social end. The precedents established by the high court in terms of individual freedom translated into subsequent judicial action on behalf of students in the state and federal courts in the 1960s and 1970s. However, judicial attention to individual rights declined as the Supreme Court changed under new membership in the late 1970s and conservative leadership in the 1980s.

With the combined efforts of state and federal legislation, campus disruptions, financial pressure, and enhancement of consumer rights, students in the 1960s and early 1970s were able to alter significantly the balance of power between students and universities. The end result was less autonomy for colleges and universities. Traditional collegiality and *in loco parentis* were no longer viable realities on campuses. The new relationship between students and higher education institutions no longer was based on the status of institutional officials, but on contract rights augmented by significant additional constitutional rights for public college and university students.

As contract rather than status began to establish the standards of the new relationship, judges were presented with the difficult task of balancing competing interests without undermining institutional authority or overreacting to demands for student rights. Courts were called upon to recognize students as adults with attendant rights and to mediate their irreconciliable differences with institutions.

The result was a patchwork of case law relating to contract interpretation which was decided in the various levels of state courts where no standardized national policy could be established. Decisions were not consistent among federal districts nor were they completely observant of what students perceived as the rudimentary elements of fair play. Contract law continued to be affected by three basic problems in most cases:

> (1) the demonstrated judicial reluctance to interfere with the internal conduct of college life, (2) the typically college-oriented contract terms contained in college catalogues and other publications, (3) the unreceptive judicial attitudes toward student challenges in the academic area. (Millington, 1979, p. 420)

Close examination of representative breach of contract cases reveals an interesting pattern in the decisions of the courts. The changes that occurred in educational jurisprudence have involved incremental rather than radical changes. First, students were recognized as citizens under the constitution with respect to due process (Dixon v. Alabama State Board of Education, 1961). Then, students in private institutions claimed similar rights in disciplinary dismissals under contract (Carr v. St. John's University, 1962). Expelled students in Carr (1962) were able to convince the trial court of the validity of their claim that the catalogue provisions under which they were dismissed were overly vague. However, they were overturned on appeal. The

appellate court continued to support the private university's liberty to contract. Reminiscent of earlier U. S. Supreme Court rulings supporting laissez faire in labor relations, the appellate court apparently believed that the students had a right to chose to attend a private Catholic institution which had an acknowledged set of harsh disciplinary regulations related to its sectarian purpose.

However, Carr (1962) did represent a slight gain for private university students. Anthony (1928) had held that the university could dismiss students without giving an adequate reason, the university claiming simply and arbitrarily that expelled student was not "a typical Syracuse girl." Carr (1962) limited Anthony (1928) in holding that the university could expel a student "not arbitrarily, but in exercise of honest discretion based on facts within its knowledge that justify exercise of discretion" (p. 414).

Courts after Dixon (1961) did not dictate that private postsecondary institutions must provide due process procedures in student dismissals (Green v. Howard University, 1967). In response to many pressures and the passage in 1972 of the 26th Amendment to the U. S. Constitution giving students adult status with the right to vote, private colleges and universities for the most part joined public colleges and universities in voluntarily establishing written guidelines for due process. Once established and printed, private institutions were held to substantial compliance with

the terms for due process (Winokur v. Yale University and Mason v. Yale University, 1977). Slight deviations were often permitted in disciplinary procedures as long as the court determined that fundamental fairness was maintained (Winokur v. Yale University and Mason v. Yale University, 1977). Such actions as failing to give an opportunity for a student and his counsel to attend a hearing (Kwiatkowski v. Ithaca College, 1975) or failing to give a hearing before the recognized review board (Tedeschi v. Wagner College, 1980) resulted in student victories. Failure of the student to appear at a hearing did not invalidate a suspension (Swanson v. Wagner College, 1979), nor did challenges to composition of the hearing board (Pride v. Howard University, 1978).

In a few rare cases, courts appeared to advance the rights of private university and college students another step by using the state action principle to grant constitutional due process rights to students (Powe v. Miles, 1968; Ryan v. Hofstra University, 1972). Although this approach was successful on occasion, the tendency of the courts was to dismiss claims of state action in private institutions as unfounded (Grafton v. Brooklyn Law School, 1973; Green v. Howard University, 1969; Grossner v. Trustees of Columbia University, 1968).

As a rule, courts categorically refused to enter disputes in either public or private colleges and universities concerning evaluations of student academic performance or in

determinations of appropriate standards of scholarship (Abrams v. Illinois College of Podiatric Medicine, 1979; Balogun v. Cornell University, 1971; Jansen v. Emory University, 1978; Mahavongsanon v. Hall, 1976; Mustell v. Rose, 1968; Neel v. Board of Trustees, 1982; Paulsen v. Golden Gate University, 1979; Sofair v. State University of New York Upstate Medical Center College of Medicine, 1978; Watson v. University of South Alabama College of Medicine, 1979). Unless the institution had exercised bad faith or had abused its discretion, courts were hesitant to interfere. Policy considerations likely encouraged the courts to restrain from interfering for fear that disgruntled students everywhere would ask courts to become arbiters of the quality of their academic performance and their eligibility for degrees.

In their attempts to get the courts to review their academic cases, students resorted to several consumer tactics. When a student alleged that the institutional official had not followed the recommendations of a grade change committee in accordance with a written policy for grade changes, the court refused to intervene in the internal affairs of the institution regarding determinations about grades (Lyons v. Salve Regina College, 1977). When the student's complaint addressed procedures for averaging grades (Watson v. University of South Alabama College of Medicine, 1979), or evaluations which were discriminatory and not in

accordance with published standards (Balogun v. Cornell University, 1971), the courts ruled in favor of the institution. When the issue was failure of the institution to drop failing grades when computing cumulative grade point averages (Johnson v. Sullivan, 1977; Shields v. The School of Law, Hofstra University, 1980), or failure of the institution to round up the grades (Marquez v. University of Washington, 1982), the result was the same. Courts refused to substitute their expertise for that of experienced faculty and academic administrators.

When students accused institutions of placing them at a disadvantage them by adding additional degree requirements after admission (Mahavongsanon v. Hall, 1976) or changing standards during their tenure (Atkinson v. Traetta, 1974; Schoppelrei v. Franklin University, 1967) courts were equally unsympathetic. A complaint that faculty were required to write a recommendation for a student whose academic performance was sporadic was also unsuccessful (Woodruff v. Georgia State University, 1983).

In rare cases under unusual circumstances, the courts did overrule the decisions of institutions in academic decisions. When the institution placed additional degree requirements on a student whose original contract could not be completed due to arbitrary action on the part of the institution, the court ordered conferral of a degree (De Marco v. University of Health Sciences/the Chicago Medical School, 1976. Likewise,

the court ordered the institution to continue a student whose contract at admission had specifically stated that students would be judged on the program standards listed in the catalogue at admissions (University of Texas Health Science Center at Houston v. Babb, 1982). Furthermore, the court ordered an academically dismissed student reinstated when violations of agreements in affirmative action documents determined as the basis for the contract figured into the academic controversy (Yakin v. The University of Illinois Chicago Circle Campus, 1981). Although students in these cases were victorious, their cases were quite unusual and did not represent overall increases in the rights of student in academic matters.

In a disciplinary dismissal for academic dishonesty in a sectarian university, the court "sidestepped" the issue of whether using an unauthorized co-author's name on a published article was ground for dismissal by refusing to apply strictly the terms of the catalogue and student honor code (Slaughter v. Brigham Young University 1975). Instead, it ruled that only "some elements of the law of contracts [were applicable to the relationship] . . . to provide some framework into which to put the problem of expulsion for disciplinary reasons" (p. 626).

Students made significant advancements in rights in cases which did not involve disciplinary or academic dismissals. In cases involving inaccurate academic advisement made by

authorized agents of the institution which disadvantaged students, students were successful in convincing the courts to intervene on their behalf (Blank v. Board of Higher Education, 1966; Healy v. Larsson, 1971). In cases involving program terminations or reductions in the quality of programs, students also made incremental advances. Although the student in Galton v. College of Pharmaceutical Sciences (1972) did not win because the institution could show financial exigency, the court acknowledged that when an institution terminates a program, there "must be an opportunity to inquire into the basis of the determination" (p. 912). When an institution admitted students and then cancelled the program before school started because of limited funds, the courts examined the institution's claim and ordered the program to continue because the termination would not result in a savings for the institution that year (Eden v. Board of Trustees, 1975). When an institution's failure to uphold accreditation standards seriously disadvantaged students who were already enrolled, the court awarded damages (Behrend v. State, 1977; Pacquin v. Northern Michigan University, 1977). Students also were awarded damages when an institution allowed a program to deteriorate to such a degree that the institution was no longer upholding its contractual obligations to its students (Lowenthal v. Vanderbilt University, 1977). Students in Speier v. Webster College (1981) were equally successful when an institution

arbitrarily disadvantaged them by closing a program in the middle of their tenure as students. Although the student was victorious at the trial level in a similar case, the institution prevailed on appeal (Montana v. Peretti, 1981). Significantly, the federal district court which was reversed had ruled that the students whose program was cancelled had an interest protected by the 14th Amendment.

In cases dealing with cancellation of classes, the results were mixed. One student was unsuccessful in convincing the court that a minimal cancellation merited a refund tuition (Paynter v. New York University, 1971). Another student's case was remanded to determine if a cancellation of one month was minimal (Zumbrun v. University of Southern California, 1972). Another student was successful in persuading the court to order a protesting faculty to continue classes (De Vito v. McMurray, 1970).

In cases involving admissions, students were only moderately successful in enlarging their rights. As long as institutions adhered to admissions criteria printed in their catalogues, students were unsuccessful in overturning the decision of institutions even if the criteria were somewhat vague (Donnelly v. Suffolk University, 1975). In contrast, when institutions considered other criteria not printed in its documents, students were victorious (Steinberg v. Chicago Medical School, 1977). Courts did not require institutions to admit students. Essentially, they were merely required to

consider them for admission according to whatever printed criteria they selected.

Students also met with mixed results in cases involving tuition refunds. Courts did not recognize a prorated tuition refund when classes were cancelled for a minimal time (Paynter v. New York University, 1971), nor would they prevent institutions from increasing tuition more than was indicated in catalogues and other printed documents (Basch v. George Washington University, 1977; Eisele v. Ayers, 1978). Students were also unable to prevent an institution from charging a transfer fee within the institution (Auser v. Cornell University, 1972). Furthermore, when a student paid tuition in advance and then withdrew to enter another school in the week before school began, the court refused to grant a refund (Drucker v. New York University, 1969).

However, there were tuition cases where students were successful. In a case where illness caused withdrawal, the court awarded a refund (Dubrow Briansky Saratoga Ballet Center, Inc., 1971). The court also refused to allow the institution to charge additional fees once fees had been paid (Silver v. Queens College of the City University, 1970). When a student paid a deposit and advance tuition and then notified the school of withdrawal 1 month before the school year began, the court refused to refund the deposit, but remanded the case with the suggestion that the contract terms implied that the tuition should be refunded (Cazenovia

College v. Patterson, 1974). Moreover, when the court felt the award of a tuition default would produce unconscionable results because the institution had taken unfair advantage of a student who spoke little English, the court did not force the student to pay a tuition default (Albert Merrill School v. Eugene Godoy, 1974).

Overall, students in the late 1960s and 1970s experienced retreats and advances in their efforts to enlarge their rights. Students in the late 1970s and 1980s began to feel the influence of the end of the Warren Court's activism. The Burger Court began a gradual process of drawing the line on students rights. The U. S. Supreme Court's major decisions denying students procedural due process in academic dismissals (Board of Curators of the University of Missouri v. Horowitz, 1978) and substantive due process in academic dismissals (Regents of the University of Michigan v. Ewing, 1985) "struck at the heart" of all student efforts to enlarge their rights.

Student litigation in the 1980s sounding in contract yielded similar negative results in cases concerning academic matters (Marquez v. University of Washington, 1982; Neel v. Indiana University of Trustees, 1982; Patti Ann H. v. New York Medical College, 1982). Cases relating to disciplinary dismissals (Cloud v. Trustees of Boston University, 1983; Coveney v. President and Trustees of the College of the Holy Cross, 1983), and a cases concerning tuition increases were

also defeats for students (Prusack v. State, 1986). The reservation clause made infamous in Anthony (1928) re-surfaced in the 1980s, insulating the institution from interference from the courts (Aronson v. North Park College, 1981). As the federal judiciary became more conservative, courts in the 1980s were not as willing to intervene in institutional affairs or as prone to continue the gradual trend towards enlarged student rights which had begun with Dixon (1961).

CHAPTER VII
PAST AND PRESENT THEMES AND FUTURE DIRECTIONS

What's past is prologue.
(Shakespeare, 1623, The Tempest: Act II.i. 247)

Present-day students are in some ways more like their counterparts in the medieval student guilds at Bologna than their predecessors in the magisterial guilds at Paris, Oxford, and Cambridge. Bolognese law students were older, more mature, and held a more legalistic, contractual view of their relationship with university masters than did their counterparts in the northern universities. More politically and socially sophisticated than the students at Paris and its lineal descendants, Oxford and Cambridge, Bolognese law students formed universitates, or guilds, for their mutual safety and protection of property. These autonomous student guilds were granted papal and imperial privileges which guaranteed them adequate housing, fair trade practices, and exemptions from military service, tolls, taxes, and the duties and responsibilities of other citizens. As guilds operating under Roman law, they were able to formulate their own rules and regulations and to contract with masters to teach them. Exercising their power, they placed the teaching

staff under a stringent set of student controls and threatened to boycott or migrate if their demands were not met. Essentially, the 13th-century Bolognese students were able to maintain control over relations between the two parties because they had control over the lecturers' incomes.

By the 15th century, the turbulent and disruptive social and political conditions which had been imposed upon medieval students had improved. Ultimately, the unique concept of student power through association in student guilds did not endure because it had become incompatible with accepted social patterns. Meanwhile, at the University of Paris, and later Oxford, Cambridge, and the northern European universities, students had been placed under the control of equally strong magisterial guilds. The magisterial guild pattern endured. The Puritans who left England for America brought with them the medieval guild traditions of Paris and the English common law tradition of in loco parentis. Although colonial American students rarely rebelled against the established social order, the desire for participation in university governance and demands for fair and just treatment were to emerge again. The demands of present-day students for rights--contractual or constitutional--are faint echoes of the demands voiced by the early European university students in the 13th century.

As Nevins (1962) has noted, history is "a bridge connecting the past with the present and pointing the road to

the future" (p. 39). In this chapter, the contractual relationship between students and their colleges and universities is presented as the bridge from the past to the present to the future.

A Glimpse of the Past

The parents of medieval students at the prototypic University of Paris had chosen to apprentice their young to the magisterial guilds because they saw association with scholarly masters as the best means for their children to achieve social advancement. Under the medieval trade guild system, of which the magisterial guilds were a part, the parents contracted with a master and, in most cases, paid the experienced master a fee to take their pre-adolescent child into his home and train him. From then on, the child was subject to the *in loco parentis* authority and tutelage of the master. After several years of thorough training, the apprentice became a journeyman who could work and receive some salary as he continued to study under the watchful eye of the guild. When he advanced to the level of master, he could become a member of the guild and enjoy scholarly privileges recognized by the church and state. For those who had no wealth or position in medieval society, association with and later membership in the guild was considered a great benefit.

Masters at Oxford and Cambridge followed the pattern established at Paris and also associated themselves in protective guilds. The undergraduates who were apprenticed by their parents to these magisterial guilds were also subject to the terms of the masters' discipline, "parental" regulation, and general supervision. Although the students at Oxford and Cambridge had no rights other than those they received by virtue of their association with members of the guild, they gladly accepted the guild's disciplinary codes and restrictions in exchange for the protection and benefits afforded them as wards of the magisterial guild. Moreover, in light of the social and political conditions in the later Middle Ages, few, if any, students were in a position to demand rights or to question the university masters' control of their lives. Indeed, the whole concept of individual rights was alien to these students.

One theme to emerge from the Enlightenment was that the ordinary man was important and worthy of dignity and respect. Leading Enlightenment intellectuals rejected conventional wisdom and tradition and questioned the authority of established institutions. American colonists were greatly influenced by the radical new ideas of the Enlightenment. They were antagonistic to Old World ideas of privilege and to rigid class distinctions which were an integral part of European social order. Indeed, the colonists believed so strongly in "rights" that they included as part of the United

States Constitution a written "Bill of Rights," guaranteeing all citizens basic individual rights. However, as subjects of the in loco parentis authority of college officials, colonial college students enjoyed only those rights that college officials chose to grant.

The revolutionary American colonists "fired" the imaginations of people the world over with their ideas about equality and individual rights. Long before American students began demanding rights, students from other parts of the world had rejected the older idea of scholarly privilege and were demanding rights. Throughout the 18th century, German university students set the pace for enlarged student rights in European universities with their emphasis on lernfreiheit, the freedom to learn. Leading American intellectuals who traveled to Germany to complete advanced study also were influenced by the ideals of the German university. Many returned to America to teach, with some of them becoming presidents of important early research universities. They transplanted to American higher education the new German outlook about scholarly research and enlarged student rights.

In comparison to students from other countries, the opportunities for advancement and the potential for an imporved standard of living of most Americans students in the mid-1800s were more promising. Most American students tended to remain relatively compliant because they continued to

enjoy the benefits made possible by college attendance. A few disgruntled professional students in the late nineteenth century, however, demanded more fair treatment at the hands of arbitrary and unjust university officials. Following the example of corporations that were pressing for liberty of contract, they claimed that their contractual rights had been violated in cases involving tuition, withholding degree, and dismissals.

When reviewing students' cases for breach of contract, the early 20th-century courts continued to show deference to college and university officials. These decisions were consistent with early 20th-century U. S. Supreme Court decisions regarding the courts' refusal to interfere in the internal affairs of private enterprise. Usually the courts relied on precedents which recognized the in loco parentis authority of institutional officials to enforce rules and regulations for behavior. On a few occasions, when the actions of the institutional officials could be shown to be abusive and excessively arbitrary, the courts found in favor of the student. Usually the student could not present such proof. In the 1920s, college and university officials who wanted to avoid breach of contract litigation began to include expressed terms in their catalogues which reserved to colleges the right to expel students for vaguely defined reasons, often without having to declare the reason. The court's decision supporting the institution's use of such

reservation clauses brought an end to student contract litigation for the next 30 years (Anthony v. Syracuse University, 1928).

For American students after World War II, the struggle to force recognition of their rights was slow and painful. Post-World War II students faced great resistance from academic leaders who relied on a legacy of academic custom and tradition in which university attendance had been considered a privilege. Furthermore, students confronted the adopted English collegiate system in which the university's authority had been institutionalized in the form of in loco parentis, translated into the common law by Blackstone, and legitimized by American courts in case law. Students also were presented with serious obstacles by the courts which relied on precedents that reinforced deference to institutional authorities in student-university conflicts. Frequently the courts cited an extensive body of case law from the late 19th and early 20th centuries which reflected the judiciary's reluctance to interfere with the private sector's liberty to contract.

As the times changed and students and society changed with them, so did the inclinations of the U. S. Supreme Court. In the 1940s, the Supreme Court began to show an unprecedented concern for individual rights. As part of a move to protect citizens whose individual rights were threatened, the court extended constitutional protection to

university faculty members in academic freedom cases in the 1950s. Furthermore, the Warren Court interferred with the internal affairs of schools in Brown v. Board of Education of Topeka (1954) by ruling that separate but equal schools for black students were inherently unequal and therefore unconstitutional.

In 1961, the District Court of Appeals of the Fifth Circuit handed down another historic ruling on behalf of students (Dixon v. Alabama Board of Education, 1961). The court recognized that dismissed black students had the constitutional right to due process in cases of disciplinary dismissal. Subsequent students in public universities were able to use the Dixon (1961) precedent to greatly expand the legal rights of all students in public higher education. The courts, however, ruled in subsequent cases that constitutional rights were not applicable to students in private colleges and universities unless the affairs of the institution and the government were so entangled that the state action principle was "triggered." In such rare cases, students from private institutions would be provided constitutional due process in disciplinary dismissals. Otherwise, the source of student rights for students from private colleges and universities remained the contract.

Public university students also discovered that only disciplinary dismissals were covered by constitutional due process. In academic dismissal cases involving students from

public and private colleges and universities, the courts refused to apply constitutional due process. Also in cases involving disputes over tuition, admissions, degree withholding, discontinuation of programs or classes, or failure to adhere to printed policies and guidelines, the courts recognized the contract, not the constitution, as the source of these rights. After almost 40 years of disregard for the contract, students in both public and private universities in the 1960s returned to the contract as a basis for claims for redress.

The success or failure of American students in past and present-day breach of contract suits is a product of social and legal patterns which have developed since the inception of Harvard College in 1636. In the first half of the 20th century, student litigants who based their claims on breach of contract received occasional redress. In similar lawsuits for breach of contract, student litigants in the last 20 years have not been encouraged. While they have emerged victorious on some issues, the courts generally have refused to view the student-university relationship as subject to standard commercial contract law principles. At best, progress in the struggle for contractual rights has been incremental.

What many present-day students fail to perceive when they take their contractual disputes to court is that the court is the final arbiter of the contract's terms. Unfortunately,

courts are not always consistent in their interpretations, nor do students and the courts always agree on what the contract means. Indeed, courts often interpret the contract in ways that are surprising to students and institutional officials alike. Nonetheless, several trends have emerged as the courts increasingly have been called upon to resolve cases involving breach of contract claims in the second half of the 20th century.

The Status of Present-Day Student Contract Litigation

In contrast to courts at the turn of the century, present-day courts consistently view the relationship between students and their colleges or universities as contractual, with additional constitutional protections required if the institution is public. Essentially, *in loco parentis* is a dead issue. Considering society's long-standing emphasis on higher education and the increased financial responsibility students are asked to assume, the view that higher education is a privilege is incompatible with societal values and legal precedents. The notion that the university and the student are involved in a trust or fiduciary relationship is no longer applicable.

As interpreters of the educational contract, the present-day courts recognize that both students and institutions have attendant rights and obligations which are stated or implied in the circulars, handbooks, bulletins, catalogues, and

regulations made available to students at enrollment. The courts continue to review the actions of institutions in situations where students can prove that, in violation of contract terms, institutions have acted arbitrarily or in bad faith. The courts continue to force students to uphold their contractual obligations as well.

With respect to student rights, present-day courts recognize the distinctions which past courts have made between public and private higher education institutions. Courts in the 1960s carefully distinguished between the responsibilities of officials at public colleges and universities and those at private colleges and universities. They mandated officials at public institutions to observe the constitutional rights of students in cases involving such issues as disciplinary dismissals, admissions, search and seizure, freedom of speech, freedom of the press, freedom of association, and racial and sexual discrimination. However, in the academic dismissal cases of students at public higher institutions, officials were not held to strict adherence to constitutional due process. Therefore, the courts recognized that students at public colleges and universities, like their counterparts in private institutions, had the right to state a claim in contract in cases involving such issues as academic dismissals, tuition and fee disputes, adherence to stated policies and guidelines, and discontinuation of classes or programs.

Present-day students can expect the courts to refuse to infringe on the autonomy of private institutions by dictating the terms of their contracts with students. As Friendly (1969) has observed, American courts since the historic case, Trustees of Dartmouth College v. Woodard (1819), have steadfastly supported

> the very possibility of doing something different than government can do, of creating an institution free to make choices government cannot--even seemingly arbitrary ones--without having to provide a justification that will be examined in a court of law. (p. 30)

Reflecting a long-standing tradition of respect for the autonomy of private enterprise, the present-day courts do not interfere with the private institution's right to contract nor the student's right to enter into a contract as long as the terms are mutually understood. The only exception is when affirmative action or discrimination is at the heart of the student's complaint. In cases of invidious discrimination, the courts will review carefully the actions of private institutions because they apparently deem the protection of an individual's civil rights to outweigh the private institution's liberty to contract.

In cases where private institutions base dismissals on vague language in the catalogue, most courts continue to support the institution. They generally do not construe the terms of the contract against the institution. In such cases, the courts apply the arbitrary-capricious-bad faith

standard for review. When applying this standard, very few actions of officials are judged unreasonable or arbitrary. Indeed, a student commentator has noted that in such instances, the courts seem driven to find for the private university ("Comment, Private Government on the Campus," 1963). Essentially, the courts permit private college and university officials considerable latitude.

Because of the deferential philosophy enunciated by Friendly, present-day courts uphold the type of reservation clause upon which the Carr (1962) decision relied. If prior to a student's enrollment, the private institution calls attention to a clearly stated and easily observed reservation clause in its catalogue, which reserves to the institution the right to dismiss a student for behavior which is not in accordance with the religious or private purposes of the private institution, present-day courts do not interfere with the private institution's right to enforce such a policy. Although such reservation clauses may not be compatible with public policy, the courts uphold the institution. The court's interpretation of reasonable expectations, its idea of sound public policy, and its reliance on the tradition of non-interference are the important variables in cases of this kind. The odds, however, continue to favor the private institution in dismissals based on vague contract terms.

The present-day courts' continuing practice of not construing vague contract language against the drafter of the

educational contract is at variance with the courts' standard practice in commercial contract law. Furthermore, in commercial contract law, the burden of proof is on the accused and not the aggrieved party who claims breach. Hence, Beach (1974) and various other supporters of the contract approach have noted that the failure of students to prevail in breach of contract suits against colleges or universities is not the result of contract law, but of the courts' varying interpretation of the contract in the educational context.

In cases where a private institution fails to follow its own due process procedures in disciplinary dismissals, the student appeal is often successful. Although the courts do not require due process procedures which are parallel to those mandated in public institutions, they do require that institutions act in good faith and to comply substantially with those procedures which they have outlined for dismissal cases. If, however, institutions deviate from printed policies in an effort to allow academically deficient students additional chances to continue beyond those stipulated in printed agreements, the courts do not penalize institutions for failure to comply with such policies when they eventually are forced to dismiss the student.

Many developments in contract litigation in the educational context apply equally to public and private colleges and universities. Present-day students in all

higher education institutions are successful in lawsuits for breach of contract if the institution fails to adhere to stated policies on a specific issue. Cases involving specific statements regarding tuition and fee refunds or admissions criteria are good examples of cases where students usually are upheld. Also when students are placed at a disadvantage because of misleading or inaccurate advisement from authorized institutional agents, the institution usually is forced to uphold the promises of its authorized agents.

Students who are disadvantaged because an institution, public or private, discontinues a program before enrolled students can complete their studies are usually successful. The same is true when the institution cancels classes for more than a minimal amount of time, fails to maintain accreditation standards, or fails to uphold the integrity of its program. However, if financial exigency is the real issue, the court in reviewing the actions of public colleges and universities will determine if the public interest is at stake. If so, the institution is not subject to payment of damages.

Finally, in cases where the issue is the student's academic competence or eligibility for a degree, the students in both public and private colleges and universities encounter insurmountable difficulty. With few exceptions, present-day courts defer to the expertise of the academy in cases related to the appropriateness of certain academic

standards, computation of grades, fairness of grades, and qualifications for graduation. There have been only a few unusual sets of facts which have led courts to overturn institutional decisions about grades or the granting of degrees. Most of these have been cases of students in professional schools where the financial stakes were high, the future property interest was great, and the student's grades were acceptable, though marginal. If students are to prevail, they must be ready to show proof that the institution has flagrantly abused their rights.

Future Developments in Contract Litigation

Future developments in contract doctrine in the student-university context are not easily predicted. As Jennings (1980-81) has noted,

> the present status of contract doctrine in the student-university context is uncertain. Particularly in light of the long history of cases raising the same issues, it is surprising that so little is settled in the field of law. The uncertainty does not seem to arise only from societal changes but also from persistent disagreements among courts on the interpretation and application of principles of contract law. (p. 218)

Although the disparity in past courts' interpretations of contract principles does pose difficulties in making predictions about future student-university contract relations, certain developments seem evident.

The Decline in Contract Litigation

Perhaps the first and most important prediction concerning contract litigation in higher education is that breach of contract suits probably will occur less frequently in the immediate future. When students do turn to the courts for redress, they can expect to continue to suffer defeat because of the courts' historic deference to institutional autonomy. Although contract doctrine, augmented by constitutional rights for students in public institutions, continues to characterize the relationship between students and their colleges and universities, student contract litigation is not the burning issue it was in the 1960s and 1970s. This trend seems likely to continue in the near future.

One of the most important reasons that student demands for redress through breach of contract suits have diminished in importance is that students themselves have changed since the late 1960s and early 1970s. Students live in a less secure world with less financial security. Grants and loans have been made more difficult to acquire, yet the college degree continues to be one of the primary avenues to career success and social advancement. Students continue to value power and status, and apparently many perceive money as the best indicator of status. For present-day college students, the search for a meaningful philosophy of life is not a primary goal, and their fight for individual "rights" and

related student "rights" is only an "echo" of what it was in the turbulent 1960s and early 1970s.

There are other reasons for a gradual decrease in future student contract litigation. One important reason is that the U. S. Supreme Court has defined the rights of students in academic dismissals in Horowitz (1978) and Ewing (1985), clearly drawing the line for students of the future. Another reason is that institutions now explicitly state the rights and responsibilities of students, obviating the need for future contract interpretation. When their rights are violated, future students will increasingly turn to various campus forums for resolution of legal disputes, making the need for future outside legal help unnecessary. Furthermore, many institutions now operate under consumer guidelines which address many of the unfair practices which prompted student contract litigation in the 1970s. Since future students will be more aware of their limits, they likely will perceive other issues as more pressing.

The judiciary's failure to respond to contract claims in academic matters and its deference to institutional authorities in many past instances have resulted in a diminished importance of breach of contract lawsuits for resolution of student-university conflicts in the higher education setting. Since the election of Ronald Reagan, there has been a marked increase in the number of conservative judges on the federal bench. As the U. S.

Supreme Court composition has also become more conservative under the influence of Reagan appointments, the trend toward expanded individual rights has ended. The more conservative bench has shifted its focus to other issues.

Deregulation continues to be one of the favored policies of traditional conservatives. The more conservative Supreme Court and federal bench now are pressing for more self-regulation of education. Observers can expect to see an increased emphasis on institutional autonomy, and this emphasis may be translated into a reduction in future students' rights. Certainly, with the more conservative judiciary interpreting the terms of the contract, students of the 1980s and 1990s can expect their interests based on contractual rights to be scrutinized carefully. They can also expect the courts to view the institutions' interests in an increasingly favorable light.

Other Developments

Over the past 30 years, the policy considerations of higher education increasingly have become legal questions as well. Kaplin (1985) noted that

> in the 1980s the development of higher education law continues to reflect, and be reflected in, social movements in higher education and in the world outside the campus. Various trends and movements begun in the 1970s are further altering higher education's relationship to the outside world and carving new features into the face of higher education law. (p.7)

One of the indicators of future developments in contract law in the educational context is the present socio-economic climate and its effect on institutions. If continued reductions in federal loans and grants to students continue, these, coupled with increases in inflation and rising program costs, can be expected to pose serious threats to the continued existence of certain institutions and certain costly programs within institutions. When institutions terminate programs because of limited student participation in preference for other more popular and less costly programs, some students will continue to be disenfranchised with no place to turn but the courts. In the same manner as their counterparts in the 1970s, such students will likely depend on contractual rights to protect their interests. On the other hand, if federal and state educational funds and grants to student are increased and the rate of inflation remains stable, then students will be less likely to turn to the courts as a result of program termination.

Regardless of whether funding for higher education is increased or decreased, future students will continue to perceive themselves as having a valuable interest in education arising out of the educational contract. If this interest is threatened by dismissal or academic difficulties, student likely will feel the need for some redress through contract. Although courts have almost uniformly refused to interfere in institutional decisions regarding academic

dismissals, judges may lend a sympathetic ear to students who claim that institutions admitted them with acknowledged academic deficiencies and then did not provide the necessary support for them to continue. This is particularly the case for athletes and other students whose talents generate funds for private and public higher education institutions.

In the specific case of athletes, institutions have withdrawn scholarships from students who concentrated on academics instead of athletics. They insisted that scholarships obligated student athletes to maintain sufficient levels of performance in both areas (Taylor v. Wake Forest University, 1972). If the contract obligates students to performance in both areas, the author of a note in the Columbia Law Journal (1985) contended that the contract of the student athlete also obligates the institution to provide a proportionate amount of time to be spent on instruction so that the student can develop the necessary academic skills. An institution that recruits athletes with the promise of an education but concentrates almost all the student's time on athletics could be held responsible for exercising bad faith in its contractual relations with the student. Furthermore, its agent could be held accountable for misadvising and misdirecting the student athlete. Although institutions usually have been favored in cases involving scholarship athletes, heightened concern for

quality education and public pressure on athletic programs may tip the scale in favor of the student athlete.

Economic realities also have heightened concern for institutional accountability with respect to the issue of quality of the educational experience. During the conservative mood of the recent past, state leaders have asked public higher education institutions to spend less and produce a better product. U. S. Secretary of Education William Bennett has repeatedly denounced secondary education for its mediocrity and higher education for its low standards and tolerance for curricular debasement ("Bennett," 1988). He has been joined by such noted critics as Bloom (1987) who in his critique of American education, The Closing of the American Mind, demanded a renewed emphasis on quality education.

National attention to the poor quality of American higher education is likely to translate into student consumer demands for promised educational services, especially those that relate to career preparation. In the 1970s, student consumers successfully used breach of contract suits to safeguard their rights to continued quality programming. If they perceive that institutions are diluting standards in off-campus or external degree programs or are failing to uphold accreditation standards or program integrity in campus-based programs, students in the 1980s likely will

return to the courts to force institutions to uphold their obligations under the educational contract.

The trend towards consumerism on the campus likely will lead to another contractual confrontation between higher education institutions and students. With the marked decline in the number of American students entering graduate programs in mathematics, science, and engineering, graduate schools will continue to award teaching assistantships to foreign students to attract them to universities to do research. Although many of these students have superior knowledge, their pedagogical training and language skills often prevent them from communicating effectively with students. Disadvantaged undergraduate students will seek redress from the courts for failure of the institution to provide instructors who can be understood.

Finally, one other social problem is also quite likely to lead to legal action on the part of students or their parents. Violent crime has increased so much in American society that college and university campuses are no longer the safe citadels of the past. Students have experienced increased incidences of on campus violence. Although educational contracts are subject to interpretation, most students perceive their contracts to imply that the institution is obligated to safeguard its residents. Since on most campuses students are prohibited from keeping arms or installing additional security devices in their rooms,

students are particulary vulnerable to attack. According to Kaplin (1985), at least one parent of a murdered student already has advanced breach of contract as the basis for one of the claims in a lawsuit against an institution. As violent crime increasingly becomes a more common part of campus life, Kaplin (1985) suggested that this kind of claim will certainly increase.

As has been evident from this study, application of the continuing presence of the law to American campuses is one development that can be predicted with relative certainty. Although the relationship between students and their colleges and universities will continue to evolve as social and legal patterns continue to change, the nature of the relationship is likely to remain adversarial. As in the past, some students will feel alienated and disenfranchised, and those will choose to draw the courts into the conflict. Hence, institutional authorities should plan for student litigation and take into careful consideration the legal risks involved in future decisions which infringe student rights.

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BIOGRAPHICAL SKETCH

Rosa Evans Bailey Hall was born in Blounts Creek, North Carolina, in 1946. She attended Lakeland High School in Lakeland, Florida, and was graduated in 1964. She then attended Florida Southern College in Lakeland, Florida, and, in 1968, received a Bachelor of Arts degree with a major in English and minors in education and psychology.

From 1968 to 1975, she taught English to remedial and gifted students at Auburndale Junior High School in Auburndale, Florida. While at Auburndale Junior High, she served as the supervising teacher for two education interns, sponsored various student organizations, and began the graduate program in guidance and counseling at Rollins College in Winter Park, Florida.

From 1975 to 1976, she taught reading for special education and learning-disabled students at Ormond Beach Junior High in Ormond Beach, Florida. Meanwhile, in 1976, she completed her master's degree at Rollins. From 1976 to 1977, she moved to Miami, Florida, where she taught English and history to multilingual students at Conchita Espinosa Academy.

From 1977 to 1980, she taught English at Winter Haven High School in Winter Haven, Florida. From 1980 to 1981, she worked as a counselor in the same school. She left Winter Haven in 1981 to enter the doctoral program in educational leadership at University of Florida.

While completing her doctoral program, she began working for the University of Florida's Office of Instructional Resources (OIR) as a reading teacher in the Reading and Writing Center in 1982. After one semester, she was appointed the program coordinator of the Remedial Algebra Lab. When the math tutorial program was expanded in 1984, she became the program coordinator of the OIR Peabody Math Labs. In addition to her administrative responsibilities, she taught English to international faculty, graduate students, and exchange students at the Reading and Writing Center in the 1986 academic year. In 1988, she also became coordinator of the Systematic Math Review Program at the OIR Teaching Center.

She currently resides in Gainesville, Florida.

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

James E. Heald

James E. Heald, Chairman
Professor of Educational Leadership

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

Forrest W. Parkay

Forrest Parkay
Associate Professor of Educational Leadership

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

Robert R. Sherman

Robert R. Sherman
Professor of Foundations of Education

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

Albert B. Smith III

Albert B. Smith, III
Professor of Educational Leadership

This dissertation was submitted to the Graduate Faculty of the College of Education and to the Graduate School and was accepted as partial fulfillment of the requirements for the degree of Doctor of Philosophy.

April 1988

David C. Smith (JL)

Dean, College of Education

Dean, Graduate School